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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAKS FIFTH AVENUE,
HARVE BENARD LTD.,

Petitioners,

v.

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, F/K/A CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC., AND L.W. PACKARD & CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM F. LEE
Counsel of Record
DAVID B. BASSETT
MICHAEL J. SUMMERSGILL
COLLEEN E. DUNHAM
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
(617) 526-6000

ROBERT P. LYNN, JR.
LYNN & DUNNE LLC
330 Old Country Road
Suite 103
Mineola, New York 11501
(516) 742-6200

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

150 pp

QUESTIONS PRESENTED

I. Is it proper, despite unanimous circuit precedent to the contrary, to permit a Lanham Act plaintiff seeking damages to defeat summary judgment with no evidence of materiality, consumer deception, or causation, all essential elements of a Lanham Act damages claim?

II. Is it proper, notwithstanding this Court's mandate in *Celotex Corp. v. Catrett*, to preclude summary judgment for Lanham Act defendants and constructively shift the burden of proof by allowing plaintiffs to satisfy the essential elements of their claim through a series of newly created presumptions and inferences?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

All parties to the proceeding in the court of appeals are designated in the caption. Petitioner Harve Benard, Ltd. is a private corporation organized under the laws of New York. Harve Benard Ltd. has no parent company and no publicly held company owns 10% or more of its stock. Harve Benard, Ltd. has no affiliates or subsidiaries that have issued shares to the public.

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Harve Benard, Ltd. ("Harve Benard"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-36a) is reported at 284 F.3d 302 (1st Cir. 2002). The order of the district court granting petitioners' motion for summary judgment (App., *infra*, 89a-91a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 2002, (App., *infra*, 97a-98a) and rehearing was denied on May 22, 2002 (App., *infra*, 92a-96a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) is set forth at App., *infra*, 99a-100a.

STATEMENT OF THE CASE

I. FACTS

This case involves the availability of summary judgment to Lanham Act defendants when a plaintiff seeking damages has *no* proof of materiality, *no* proof of consumer deception, and *no* proof of causation, each of which is an essential element of a Lanham Act damages claim. By al-

lowing plaintiffs to rely upon a series of previously unrecognized presumptions and inferences, the Court of Appeals' opinion for the first time permits plaintiffs proffering no more than a mere allegation of false advertising to avoid summary judgment.

In 1996, the Cashmere & Camel Hair Manufacturers Institute ("CCMI") and L.W. Packard & Co. ("Packard") asserted claims of false advertising under the Lanham Act against petitioner Harve Benard, a private manufacturer of men's and women's garments. Since 1993, Harve Benard has manufactured and sold women's low cashmere blend blazers labeled as containing 70 percent wool, 20 percent nylon, and 10 percent cashmere ("70/20/10"). These are the garments and labels at issue in this action.

II. PROCEEDINGS BELOW

CCMI and Packard filed this action on January 24, 1996. Jurisdiction in the United States District Court for the District of Massachusetts was proper pursuant to 28 U.S.C. §§ 1331 and 1338.

CCMI and Packard asserted *inter alia* that, from 1993 to at least 1997, Harve Benard's blazers were mislabeled because those blazers allegedly did not contain the labeled ten percent cashmere.

After extensive discovery, briefing, and oral argument, Harve Benard moved for summary

judgment on CCMI's and Packard's claims.[1] Harve Benard argued that CCMI and Packard could proffer *no* evidence to establish the essential elements of materiality, consumer deception, or causation.

On July 1, 1999 Magistrate Judge Zachary Karol issued a thorough forty-page decision recommending the dismissal of Packard's claims in their entirety. In the same decision the Magistrate Judge recommended the denial of Harve Benard's summary judgment motion as to CCMI. (App., *infra*, 86a-87a). After receiving and ruling upon objections, the district court adopted the Magistrate's Report in its entirety and dismissed Packard (but not CCMI) from the case. (App., *infra*, 89a-91a). Explicitly recognizing the sufficiency of Harve Benard's existing testing program, CCMI then formally moved to dismiss its remaining claim. (App., *infra*, 101a-103a).

Packard and CCMI appealed the district court's judgment to the United States Court of Appeals for the First Circuit. The Court of Appeals reversed the district court's entry of summary judgment and held for the first time that a Lanham Act plaintiff seeking damages could rely upon a *presumption* of consumer deception, a

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[1] For purposes of summary judgment only, Harve Benard presumed that its blazer labels were inaccurate. Harve Benard, however, vigorously denies the plaintiffs' allegations of false advertising and stands behind the accuracy of its labeling. Harve Benard maintains one of the most comprehensive fabric testing programs in the industry and labels its garments according to the results of such tests. (App., *infra*, 116a). As a result of this program, Harve Benard has literally hundreds of test results demonstrating that its garments are properly labeled as to cashmere content.

presumption of materiality, and an *inference* of causation to avoid summary judgment. Harve Benard's subsequent motion for rehearing was denied.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the uniform application of the Lanham Act and the disposition of Lanham Act claims at the summary judgment stage in accordance with this Court's *Celotex* opinion. The answers to these questions will have a significant impact on the ability of retailers, manufacturers and other advertisers of goods to obtain summary judgment on unsupportable claims without engaging in extensive litigation.

I. THE RULE PRIOR TO THE COURT OF APPEALS' OPINION

Prior to the Court of Appeals' decision, other circuits – and even the First Circuit itself – consistently required a plaintiff seeking damages in a Lanham Act false advertising claim to prove at a minimum that: (1) defendants made false or deceptive representations to customers; (2) those representations deceived a significant portion of the consuming public; (3) the deception was material, *i.e.*, likely to influence consumers' purchasing decisions; (4) the defendants placed the misstatement in interstate commerce; and (5) the plaintiff has been injured by defendants' conduct. *See, e.g, Clorox Co. Puerto Rico v. Proctor & Gamble*, 228 F.3d 24, 33 n. 6 (1st Cir. 2000). Absent

evidence of these essential elements, a plaintiff's claim could not stand.

A. LANHAM ACT PLAINTIFFS SEEKING DAMAGES WERE ONLY ENTITLED TO A PRESUMPTION OF CONSUMER DECEPTION IF THEY COULD SHOW INTENT

Before the Court of Appeals' opinion, only plaintiffs seeking *injunctive relief* (not damages) were entitled to a presumption of consumer deception when the alleged false advertisement was literally false.[2] *See, e.g., Camel Hair and Cashmere Institute of America v. Associated Dry Goods Corp.*, 799 F.2d 6, 15 (1st Cir. 1986) (cases under the Lanham Act have "drawn a clear distinction between the showing required to establish a right to injunctive relief and that required to establish a right to damages"); *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d 266, 272 (2nd Cir. 1987) ("the above-quoted language [the presumption] has been applied solely to claims for injunctive relief under the Lanham Act . . .").

Lanham Act plaintiffs seeking *damages*, however, had *never* before been given the benefit of such a presumption without providing additional evidence that the misrepresentations were intentional. *See Balance Dynamics Corp. v. Schmitt Industries, Inc.*, 204 F.3d 683, 693 (6th Cir. 2000) ("[T]he 'literal falsity' rule has *never* permitted a plaintiff to recover marketplace damages without other proof that such damages oc-

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[2] Alleged Lanham Act misrepresentations are characterized as either "literal" or "implied," and different standards apply to each. Only alleged "literal" misrepresentations are at issue in this discussion of the consumer deception element.

curred. Rather, this rule has been stated in suits in which the plaintiff sought *injunctive* relief . . . .") (emphasis added); *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation, Inc.*, 926 F.2d 134, 139-140 (2d Cir. 1991) ("When a plaintiff seeks money damages in . . . a false advertising case asserted under section 43(a), the plaintiff must introduce evidence of actual consumer confusion. This requirement must be distinguished from cases brought under the Lanham Act in which only injunctive relief is sought. . . .") (citations omitted).

The public policy rationale for the distinction between plaintiffs seeking injunctive relief and those seeking monetary damages was clear and universally recognized: because monetary damages benefit only a particular plaintiff – while injunctions potentially inure to the common good of all consumers – a lower standard is justified for a claim for injunctive relief. *See Balance Dynamics*, 204 F.3d at 693 ("This lower standard has arisen because when an injunction is sought, courts may protect the consumer without fear of bestowing an undeserved windfall on the plaintiff"); *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753-754 n.7 (8th Cir. 1980) (quoting J. Thomas McCarthy, McCarthy on Trademarks, § 27:5A at 250-51) ("An injunction protects the consumer from continued false advertising. Money damages, on the other hand, primarily aid only the competitor, and he is required to satisfy a higher standard of proof as to injury").

Consistent with this rationale, no court of appeals, including the First Circuit, had ever ap-

plied such a presumption to a plaintiff seeking damages without the additional showing of intentional mislabeling not present here. *See, e.g., Harper House Inc., v. Thomas Nelson, Inc.,* 889 F.2d 197, 209 (9th Cir. 1989); *Resource Developers, Inc.,* 926 F.2d at 139-140. As a result, plaintiffs seeking damages had consistently been required to satisfy the element of consumer deception with actual evidence.

B. LANHAM ACT PLAINTIFFS WERE REQUIRED TO OFFER EVIDENCE OF MATERIALITY

To prove a claim of false advertising, plaintiffs seeking damages were also required to offer evidence that any alleged false advertisement was material to consumer decisions. *See Balance Dynamics Corp. v. Schmitt Industries, Inc.*, 204 F.3d 683, 690, 693 (6th Cir. 2000) (citations omitted) ("literal falsity, without more, is insufficient to support an award of money damages to compensate for marketplace injury . . . ."). Such plaintiffs could not satisfy this element with a presumption unless the misstatements were made with a deliberate intent to deceive. *See, e.g., Resource Developers*, 926 F.2d at 140; *Clorox Co. Puerto Rico v. Proctor & Gamble*, 228 F.3d 24, 33 n.6 (1st Cir. 2000). Thus, absent a showing of intent, plaintiffs were required to present actual evidence of materiality to avoid summary judgment.

C. LANHAM ACT PLAINTIFFS WERE REQUIRED TO OFFER EVIDENCE OF CAUSATION

Even if an alleged false advertisement was found to be deceptive and material, a plaintiff previously could not recover damages under the Lanham Act unless it also demonstrated that the misstatement caused it harm. "In order to recover damages for a Section 1125(a) violation, the aggrieved party must show that it suffered *actual harm* to its business." *See Quabaug Rubber Co. v. Fabiano Shoe Co., Inc.*, 567 F.2d 154, 161-162 (1st Cir. 1977) (emphasis added). Lanham Act plaintiffs were required to establish evidence of *actual lost sales* as a result of the alleged false advertising to maintain a suit for money damages.

II. THE FIRST CIRCUIT'S NEW RULE

Abandoning its own prior precedent, and departing from the well-settled rules recognized in every other circuit, the Court of Appeals reversed the district court's entry of summary judgment despite the district court's finding that Packard had "utterly failed" to present evidence of materiality and consumer deception, and the district court's conclusion that Packard's damages theory was "inconsistent with uncontradicted evidence in the summary judgment record." (App., *infra*, 69a-71a; 76a-78a). The Court of Appeals ruled instead that Packard could simply rely upon "presumptions" of consumer deception and materiality. The Court of Appeals also held that Packard could rely upon an "inference" of causation, an inference previously only permitted in Lanham

Act cases where the plaintiff sought injunctive relief.

The Court of Appeals' substitution of presumptions and inferences in the place of admissible evidence effectively shifts the burden of proof that has been historically borne by Lanham Act plaintiffs onto defendants. Lanham Act false advertising plaintiffs now need only allege mislabeling in order to survive summary judgment. In effect, the burden now lies with defendants to *disprove* the other essential elements of the plaintiff's Lanham Act claim.

The Court of Appeals offered no rationale for its precedent-setting decision. Instead, the Court of Appeals inexplicably and incorrectly concluded, "it has become the practice of most circuits to apply the presumption to all literal falsity claims." (App., *infra*, 21a). Yet, as even the Sixth Circuit opinion relied upon by the Court of Appeals made explicit, the "literal falsity" rule has *never* permitted a plaintiff to recover damages without additional evidence not present here:

> [T]he "literal falsity" rule has *never* permitted a plaintiff to recover marketplace damages without *other proof that such damages occurred.* Rather, this rule has been stated in suits in which the plaintiff sought injunctive relief, *see, e.g., United Indus. Corp. v. Clorox Co.,* 140 F.3d 1175, 1180 (8th Cir. 1998) (emphasis added); *Seven-Up Co. v. Coca-Cola Co.,* 86 F.3d 1379, 1389 (5th Cir. 1996); *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb*

> *Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991). . . .

Balance Dynamics, 204 F.3d at 693 (emphasis added).[3]

The Court of Appeals decision therefore significantly lowered the standard for Lanham Act plaintiffs seeking damages, without any explanation. A Lanham Act plaintiff seeking damages now need offer nothing more than the bare allegation of mislabeling to avoid summary judgment. Such a plaintiff can now rely upon a *presumption* of the element of consumer deception; a *presumption* of the element of materiality; and an "*infer[ence]*" of causation. As a result, the Court of Appeals' decision (unlike the rule in any other circuit) allows plaintiffs to avoid summary judgment based on nothing more than a mere allegation of literally false advertising.

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[3] The other cases cited by the Court of Appeals also do not support its decision. In *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971-75 (7th Cir. 1999), there was no finding of literal falsity, no application of any presumption, and the court's discussion of consumer deception relied solely on cases in which plaintiffs sought *injunctive* relief. In *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 740 (8th Cir. 2000), the consumer deception element was not at issue and the plaintiff did *not* rely on any presumption but instead presented evidence of actual damages. Finally, in *Pizza Hut, Inc. v. Papa John's Intern, Inc.*, 227 F.3d 489 (5th Cir. 2000), the plaintiff did *not* seek damages for alleged lost sales (*id.* at 503, n.12), the defendant's alleged misstatements were not found to be literally false, and no presumption was applied. *Id.* at 501-02.

III. THE COURT OF APPEALS' NEW RULE IS CONTRARY TO THIS COURT'S MANDATE IN *CELOTEX CORP. v. CATRETT*

A. CELOTEX MANDATES THAT SUMMARY JUDGMENT ENTER AGAINST A PARTY WHO CANNOT ESTABLISH AN ESSENTIAL ELEMENT OF ITS CLAIM

This Court's precedent mandates the entry of summary judgment where a plaintiff cannot prove the necessary elements of its claims. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Court of Appeals' decision directly contradicts this long standing and well-settled rule.

The rationale behind *Celotex* was well-stated by this Court:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

Id. at 327 (citations omitted).

By allowing plaintiffs to survive summary judgment absent *any* evidence going to three essential elements of their claims, the Court of Appeals' decision effectively precludes defendants from obtaining summary judgment in Lanham Act false advertisement cases. The Court of Appeals' decision forces Harve Benard and other Lanham Act defendants to proceed to trial on the

basis of mere allegations regardless of the plaintiff's ultimate ability to prove its case.

B. CONTRARY TO *CELOTEX* THE COURT ALLOWED PLAINTIFFS TO CONTINUE WITHOUT A "SHOWING SUFFICIENT TO ESTABLISH" AN "ELEMENT ESSENTIAL" TO THEIR CASE

1. The Court Of Appeals Allowed Plaintiffs To Avoid Summary Judgment With No Proof Of Consumer Deception

Contrary to this Court's clear pronouncement in *Celotex*, the Court of Appeals permitted Packard to avoid summary judgment despite its undisputed inability to show that even *one* consumer was deceived by Harve Benard's alleged mislabeling.

As the district court correctly found, Packard's own 30(b)(6) witnesses made abundantly clear that Packard has no evidence of consumer deception:

- "Turning to the 1996 and the lines thereafter, what evidence does Packard have indicating that any customer would not have purchased the jacket or the jackets if they had been labeled as containing less than 10 percent cashmere?"

  "We don't have any evidence." (App., *infra*, 109a) (emphasis added).

- "What evidence does Packard have indicating that any customer would not have purchased the jackets if they had been labeled as containing even zero percent cashmere?"

  "We don't have any evidence." (App., *infra*, 109a-110a) (emphasis added).

When a plaintiff cannot establish an element essential to its claim, *Celotex* requires that defendants moving for summary judgment prevail. Despite this mandate, and notwithstanding plaintiffs' undisputed failure to proffer *any* evidence of consumer deception, the Court of Appeals allowed plaintiffs to proceed.

2. The Court Of Appeals Allowed Plaintiffs To Avoid Summary Judgment With No Proof Of Materiality

Similarly, the Court of Appeals allowed plaintiffs to evade summary judgment despite their admitted inability to proffer any evidence that Harve Benard's alleged mislabeling affected a single consumer decision:

- "What evidence does -- what specific evidence does Packard have showing that Harve Benard's alleged mislabeling has affected consumer decisions?"

"None that I know of." (App., *infra*, 108a) (emphasis added).

Despite this lack of evidence, the Court of Appeals ignored the mandate of *Celotex* and allowed Packard to proceed. Substituting its own views for that of actual consumers, the Court of Appeals simply *presumed* that the actual percentage of cashmere in a garment labeled 70% wool, 20% nylon, and 10% cashmere would be *likely* to influence the purchasing decision. (App., *infra*, 16a). [4] The Court of Appeals' reliance upon a newly created presumption in place of evidence contravenes this Court's mandate in *Celotex*.

3. The Court Of Appeals Allowed Plaintiffs To Avoid Summary Judgment With No Proof Of Causation

Finally, the Court of Appeals adopted Packard's argument that a court could "infer" harm to Packard based on nothing more than Harve Benard's use of less expensive fabrics. Without evidence in support, the Court of Appeals reasoned (a) that Harve Benard's use of *allegedly* mislabeled fabrics (b) resulted in lower fabric costs which, (c) in turn, enabled Harve Benard to lower its garment prices and to undercut its competitors who, (d) in turn, would have otherwise allegedly purchased their fabric from Packard.

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[4] It is *undisputed* that Packard presented no evidence of the materiality to consumers of the actual percentage of *cashmere content* of the 70/20/10 blazers.

As the Magistrate and the district court both recognized, this argument assumes – without any evidentiary basis – that Harve Benard's garments were cheaper *because* they were mislabeled. Among other flaws, this position ignores the undisputed fact that Harve Benard's fabric was less expensive than Packard fabric because, as labeled, it contained less expensive *recycled* cashmere. (App., *infra*, 113a). *It is undisputed that Harve Benard's garments have been labeled as containing less expensive "recycled cashmere" since 1996.*[5] (App., *infra*, 4a, fn.3). The Court of Appeals therefore impermissibly ignored the final element in a Lanham Act damages case: the element of causation.

Contrary to this Court's edict in *Celotex*, plaintiffs can thus now survive summary judgment absent *any* showing that the defendants' conduct is causally related to the plaintiffs' purported injury. In effect, Lanham Act false advertising defendants now bear the burden of *disproving* causation.

IV. THE PRESUMPTIONS NEWLY CREATED BY THE COURT OF APPEALS EFFECTIVELY ELIMINATE SUMMARY JUDGMENT FOR LANHAM ACT FALSE ADVERTISING DEFENDANTS

The Court of Appeals' decision places advertisers and merchants (both wholesalers and re-

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[5] Even the plaintiffs admit that recycled cashmere is distinct from, and far less expensive than, virgin cashmere. (App., *infra*, 113a). Indeed, there is *no* evidence that recycled cashmere and virgin cashmere even compete in the same market.

tailers) at the mercy of overzealous plaintiffs. In essence, so long as a Lanham Act plaintiff seeking damages complies with the notice pleading standard in its complaint, its claims will now remain untested until a defendant presents evidence at trial.[6] With the effective preclusion of summary judgment as a means for resolving groundless claims at an early stage, advertisers are faced with a Hobson's choice: incur significant litigation expenses or suffer unwarranted settlement costs. This is exactly the type of dilemma this Court sought to avoid in *Celotex*.

Despite the fact that a final adjudication on the merits is still to come in this matter, review of the Court of Appeals decision at the summary judgment stage is essential. In order "to secure the just, speedy and inexpensive determination of every action," *Celotex*, 477 U.S. at 327 (citations omitted), summary judgment must remain a viable option to Lanham Act defendants. If further appellate review is delayed until after a trial on the merits, the Court of Appeals' unprecedented contraction of the availability of summary judgment will escape scrutiny, and the continuing viability of *Celotex* in the context of the Lanham Act will be placed in grave doubt.

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[6] Moreover, the presumptions and inferences adopted by the Court of Appeals will also presumably allow Lanham Act false advertising plaintiffs to survive motions for judgment as a matter of law despite a failure to present evidence of key elements at trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM F. LEE
Counsel of Record
DAVID B. BASSETT
MICHAEL J. SUMMERSGILL
COLLEEN E. DUNHAM
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
(617) 526-6000

ROBERT P. LYNN, JR.
LYNN & DUNNE LLC
330 Old Country Road
Suite 103
Mineola, New York 11501
(516) 742-6200

Counsel for Petitioners

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United States Court of Appeals
For the First Circuit

No. 00-2341

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, F/K/A CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC., AND L.W. PACKARD & CO., INC.,
Plaintiffs, Appellants,

v.

SAKS FIFTH AVENUE, HARVE BENARD, LTD. AND FILENES BASEMENT,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, U.S. District Judge]

Before
Torruella, Circuit Judge,
Rosenn,* Senior Circuit Judge,
and Stahl, Senior Circuit Judge.

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* Of the Third Circuit, sitting by designation.

Robert J. Kaler, with whom Gadsby Hannah, LLP, was on brief, for appellants.

David B. Bassett, with whom William F. Lee, Michael J. Summersgill, Colleen E. Dunham, Hale and Dorr, LLP, Robert P. Lynn, Jr. and Robert P. Lynn, Jr. LLC, were on brief, for appellees.

April 1, 2002

TORRUELLA, Circuit Judge. Plaintiffs-appellants L.W. Packard & Co. ("Packard") and Cashmere & Camel Hair Manufacturers Institute (the "Institute") appeal from the district court's entry of partial summary judgment dismissing their false advertising claims under the Lanham Act, 15 U.S.C. § 1125(a), and Massachusetts state law. In particular, Packard challenges the dismissal of its claims for money damages, while the Institute argues that the district court erred in dismissing one of its claims for injunctive relief. Because we conclude that the district court relied on impermissible inferences in favor of the moving party in reaching its conclusions, we reverse and remand the case for action consistent with this opinion.

Background[1]

The Institute is a trade association of cashmere manufacturers dedicated to preserving the name and reputation of cashmere as a speciality fiber. Packard is a member of the Institute and a manufacturer of cashmere and cashmere-blend fabric.

In 1993, defendant-appellee Harve Benard, Ltd. ("Harve Benard") began manufacturing a line of women's blazers that were labeled as containing 70 percent wool, 20 percent nylon, and 10 percent cashmere. Its labels also portrayed the blazers as "A Luxurious Blend of Cashmere and Wool," "Cashmere and Wool," or "Wool and Cashmere." Harve Benard sold large quantities of these cashmere-blend garments to retail customers, including defendants Saks Fifth Avenue ("Saks") and Filene's Basement.

In 1995, plaintiffs began purchasing random samples of the Harve Benard garments and giving them to Professor Kenneth Langley and Dr. Franz-Josef Wortmann, experts in the field of cashmere identification and textile analysis. After conducting separate tests on the samples, the experts independently concluded that, despite Harve Benard's labels to the contrary, the gar-

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[1] We recite the facts in the light most favorable to plaintiffs, the nonmoving party. See Champagne v. Servistar Corp., 138 F.3d 7, 8 (1st Cir. 1998).

ments contained no cashmere.[2] In addition, Dr. Wortmann found that approximately 10 to 20% of the fibers in the Harve Benard garments were recycled -- that is, reconstituted from the deconstructed and chemically-stripped remnants of previously used or woven garments.

Relying on their experts' findings, plaintiffs filed this suit in district court claiming that defendants falsely advertised their garments in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), the Massachusetts Unfair and Deceptive Trade Practices Act, Mass. Gen. Laws ch. 93A, and the common law of unfair competition. More specifically, plaintiffs claim that the garments were mislabeled in two material respects: (1) the Harve Benard blazers contained significantly less than the 10% cashmere they were represented as having ("cashmere content claim"); and (2) any cashmere that the blazers did contain was not virgin, as the unqualified word "cashmere" on the label suggests, but recycled ("recycled cashmere claim").[3] Each plaintiff seeks a different form of relief for these alleged misrepresentations: whereas the Institute seeks a permanent injunction against any future mislabeling, Packard seeks monetary damages on the theory that it lost sales as a result of the manufacture and sale of the mislabeled garments.

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[2] The experts found that, at most, the garments contained only trace levels (less than 0.1%) of cashmere.

[3] After this suit was filed, Harve Benard agreed to label its 1996 and subsequent line of blazers as being made from recycled cashmere.

The district court granted partial summary judgment in favor of defendants, dismissing both of Packard's claims for money damages and seemingly dismissing the Institute's request for injunctive relief on its recycled cashmere claim.[4] The only ruling in plaintiffs' favor -- and thus the only ruling that they do not appeal -- was the district court's denial of defendants' summary judgment motion on the Institute's cashmere content claim for injunctive relief.

After the district court's summary judgment ruling, however, the Institute chose to voluntarily dismiss this remaining claim so that it could expedite the appeal of its recycled cashmere claim for injunctive relief.

Standard of Review

Plaintiffs appeal the district court's summary judgment dismissing Packard's cashmere content claim for money damages; Packard's recycled cashmere claim for money damages; and the Institute's recycled cashmere claim for injunctive relief. We review de novo the district court's summary judgment dismissing plaintiffs' claims. See Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001).

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[4] As discussed further below, it is not entirely clear from the summary judgment order whether the district court intended to dismiss the Institute's request for injunctive relief on its recycled cashmere claim.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]o defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting enough competent evidence to enable a finding favorable to the nonmoving party." LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993) (internal quotation marks omitted). In exercising our review, we construe the record evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000).

For the purposes of this appeal, defendants concede that the issue of whether the garments were mislabeled is both material and genuinely in dispute. They argue, however, that there is no evidence that their mislabeling deceived any members of the consuming public or caused plaintiffs any harm. Defendants thus seek summary judgment on the grounds that plaintiffs cannot adduce sufficient evidence of consumer deception or causation to satisfy the requirements of the applicable law.

Discussion

I.

Before delving into the merits of plaintiffs' appeal, we pause to address a jurisdictional challenge. Defendants argue that the Institute has no legal standing to seek appellate review because the Institute is impermissibly attempting to appeal from its own voluntary dismissal. After the district court's grant of summary judgment, the Institute had at least one remaining claim against defendants. Rather than pursuing that claim to trial, however, the Institute voluntarily moved to dismiss its claim with prejudice. Shortly thereafter, the Institute timely filed the instant appeal. Since it is well known that generally "a plaintiff may not appeal a voluntary dismissal because there is no involuntary or adverse judgment against him," Bell v. City of Kellogg, 922 F.2d 1418, 1421 (9th Cir. 1991), defendants contend that this Court lacks jurisdiction over the Institute's improper appeal.

Defendants acknowledge in their brief, however, that there is a narrow exception which permits appeals from voluntary dismissals where the dismissal was sought to expedite review of a prejudicial interlocutory ruling. See John's Insulation, Inc. v. L. Addison & Assocs. Inc., 156 F.3d 101, 107 (1st Cir. 1998) (noting that "most circuits hold that voluntary dismissals, and especially those with prejudice, are appealable final orders," and holding that "a plaintiff that deems

an interlocutory ruling to be so prejudicial as to deserve immediate review . . . has the alternative of dismissing the complaint voluntarily"); Martin v. Franklin Capital Corp., 251 F.3d 1284, 1288 (10th Cir. 2001) (same holding). Nevertheless, defendants assert that the Institute does not fall within this exception because its voluntary dismissal was not sought for the purposes of obtaining immediate appellate review of a prior order, but rather because the Institute realized that its remaining claim was without merit.

Defendants' argument is undermined, however, by that portion of the record establishing that the Institute voluntarily dismissed its remaining claim, in part, so that it could appeal adverse rulings in the summary judgment order. In its motion to dismiss, the Institute unequivocally stated:

> "[The Institute] has determined that the most appropriate course of action is to dismiss [its remaining claim] with prejudice to avoid an unnecessary trial on that issue, without prejudice to the plaintiffs' right to appeal the broader rulings dismissing the bulk of their claims."

The Institute's motion thus demonstrates that (1) it believed that the summary judgment order significantly prejudiced its case by dismissing "the bulk of [its] claims," and (2) the Institute sought the voluntary dismissal to expedite appel-

late review of the prior order. Because the Institute has satisfied the prerequisites for appealing a voluntary dismissal, see John's Insulation, 156 F.3d at 107 (noting that "the proper course of action is to file a motion for voluntary dismissal with prejudice, stating explicitly that the purpose is to seek immediate review of the interlocutory order in question"), we conclude that the Institute is properly before this Court.

At oral argument, defendants unveiled a new contention: they claimed that the Institute could not avail itself of the exception because the summary judgment order did not substantially prejudice the Institute, as is required by existing caselaw. See id. In particular, defendants argued that since the summary judgment order did not dismiss any of the Institute's claims for injunctive relief, there is insufficient prejudice to allow the Institute to appeal its voluntary dismissal.

Defendants' argument fails for two reasons. First, defendants waived this argument by failing to raise it in their brief. See Frazier v. Bailey, 957 F.2d 920, 932 (1st Cir. 1992) (ruling that arguments not fully presented in appellate brief are waived). Defendants cannot utilize oral argument as a forum for unveiling new arguments of which plaintiffs did not have proper notice or opportunity to challenge.

Second, it appears that the district court actually dismissed the Institute's recycled cashmere claim for injunctive relief, thereby giving the

Institute sufficient prejudice to appeal its voluntary dismissal. As discussed in more detail below, for a plaintiff to succeed on a false advertising claim under the Lanham Act, he must demonstrate, among other things, that the alleged misrepresentation deceived the public or had a tendency to deceive the public. See Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 n.6 (1st Cir. 2000). In some limited circumstances, however, the law absolves the Lanham Act plaintiff of this burden and allows him to benefit from a presumption of consumer deception. See id. at 33 (noting that a court "may grant relief without considering evidence of consumer reaction"). In assessing whether the Institute demonstrated consumer deception, the district court determined that the Institute was entitled to a presumption of consumer deception on its claim that defendants overstated the cashmere content, but was not entitled to such a presumption on its recycled cashmere claim.[5] The district court then concluded that "[b]ased on the presumption alone, Defendants' motion for summary judgment should be denied . . . " It is clear, then, that the district court explicitly denied summary judgment only on the Institute's cashmere content claim, as that is the only claim to which the district court applied "the presumption."

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[5] The district court mistakenly referred to this presumption as a "presumption of materiality." For the sake of clarity, we refer to materiality only as that element which requires a plaintiff to show that the alleged misrepresentations "influence[d] the purchasing decision." Clorox, 228 F.3d at 33 n.6. Whether a misrepresentation is material is thus a separate inquiry from whether a misrepresentation deceived the consuming public. See id.

The district court, however, neglected to determine whether the Institute demonstrated consumer deception, absent a presumption, on its recycled cashmere claim. The parties draw opposite conclusions from the district court's ambiguous resolution of this matter: ironically, plaintiffs argue that the claim was dismissed for failure to demonstrate consumer deception, while defendants assert that it was not.

Though both arguments are equally plausible given the district court's silence on the issue, we conclude that plaintiffs' assertion that the claim was dismissed more persuasive in light of the circumstances. Immediately after skipping over the issue of whether the Institute demonstrated consumer deception on its recycled cashmere claim, the court assessed whether Packard had proved consumer deception on its claims for money damages. After analyzing the proffered evidence, the district court found that Packard's proof of consumer deception was insufficient. Since the district court dismissed Packard's claims, in part, because Packard was unable to demonstrate consumer deception, it is reasonable to assume that the district court intended to dismiss the Institute's remaining claim for the same reason, especially because plaintiffs were relying on the same evidence to prove both.[6]

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[6] Furthermore, the district court ruled that plaintiffs' recycled cashmere claim was one of implied falsity. Absent a presumption, an implied falsity claim can be established only by actual evidence of deception, "usually in the form of market research or consumer

Considering the ambiguity surrounding the district court's order on this issue, the apparent intention of the district court to dismiss the Institute's recycled cashmere claim, and the Institute's dismissal of its remaining claim to seek immediate appellate review of the summary judgment order, we find that the Institute has satisfied the prerequisites to appeal its voluntary dismissal.

II.

The Lanham Act prohibits false and misleading descriptions of products and services in interstate commerce. See 15 U.S.C. § 1125(a). The statute was designed to protect consumers and competitors from any duplicitous advertising or packaging which results in unfair competition. See id.[7]

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surveys, showing exactly what message ordinary customers received from the ad." J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:55 (4th ed. 2001); see also Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 15 (1st Cir. 1986) (noting that "consumers' reaction is the starting point when the allegation is based merely on the tendency of the defendant's representation to deceive"). Plaintiffs failed to offer any evidence of surveys or market research to demonstrate consumer deception. Given this lack of evidence, it is reasonable to assume that the district court intended to rule -- if it did not actually -- that the Institute could not meet its burden of demonstrating consumer deception on its recycled cashmere claim.

[7] The false advertising provisions of the Lanham Act provide:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or

To prove a false advertising claim under the Lanham Act, a plaintiff must demonstrate that (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products. See Clorox, 228 F.3d at 33 n.6.

A plaintiff can succeed on a false advertising claim by proving either that the defendant's advertisement is literally false or implicitly false -- that is, the advertisement is true or ambiguous yet misleading. See id. Where the advertisement is literally false, a violation may be established without evidence of consumer deception. See id.;

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device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

Balance Dynamics Corp. v. Schmitt Indus., 204 F.3d 683, 693 (6th Cir. 2000) (noting that when a statement is literally false, "a plaintiff need not demonstrate actual customer deception in order to obtain relief "). Where the advertisement is implicitly false, however, "an additional burden is placed upon the plaintiff to show that the advertisement . . . conveys a misleading message to the viewing public." Clorox, 228 F.3d at 33.[8]

In addition, this Court has recognized a difference in the burdens of proof between injunctive relief claims and monetary damages claims under the Lanham Act. In Quabaug Rubber Co. v. Fabiano Shoe Co., Inc., 567 F.2d 154 (1st Cir. 1977), we held that whereas a showing that the defendant's activities are likely to cause confusion or to deceive customers is sufficient to warrant injunctive relief, a plaintiff seeking damages must show actual harm to its business. See id. at 160-61.[9]

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[8] As discussed below, a plaintiff alleging an implied falsity claim, however, is relieved of the burden of demonstrating consumer deception when there is evidence that defendants intentionally deceived the consuming public. See Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134, 140 (2d Cir. 1991) (ruling, with respect to an implied falsity claim, that "[o]nce it is shown that a defendant deliberately engaged in a deceptive commercial practice, we agree that a powerful inference may be drawn that the defendant has succeeded in confusing the public").

[9] Furthermore, unlike a plaintiff seeking injunctive relief who only has to show that the misrepresentation had the tendency to deceive, a plaintiff seeking monetary damages must show that consumers were actually deceived by the misrepresentation, PPX En-

With these elaborate and intricate statutory requirements in mind, we assess plaintiffs' claims to determine if there is enough competent evidence for a reasonable factfinder to conclude that they have satisfied their burdens of proof under the Lanham Act.

A. Concessions

For the purposes of this appeal, defendants concede that they have made a false or misleading statement of fact in describing their blazers. Defendants also concede that they placed these misrepresentations in interstate commerce.

B. Materiality

The materiality component of a false advertising claim requires a plaintiff to prove that the defendant's deception is "likely to influence the purchasing decision." Clorox, 228 F.3d at 33 n.6. One method of establishing materiality involves showing that the false or misleading statement relates to an "inherent quality or characteristic" of the product. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997).[10]

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ter., Inc. v. Audiofidelity Enter., Inc., 818 F.2d 266, 271 (2d Cir. 1987), unless he can avail himself of a presumption to that effect.

[10] Whether a misrepresentation is material has nothing to do with the nature of the relief sought or the defendant's intent. Rather, materiality focuses on whether the false or misleading statement is likely to make a difference to purchasers. See J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:35 (4th ed. 2001). Thus, even when a statement is literally false

On their first claim, plaintiffs argue that overstating the cashmere content of cashmere-blend blazers is material because the misrepresentation relates to an inherent characteristic of the product sold. Indeed, it seems obvious that cashmere is a basic ingredient of a cashmere-blend garment; without it, the product could not be deemed a cashmere-blend garment or compete in the cashmere-blend market. Thus, it seems reasonable to conclude that defendants' misrepresentation of the blazers' cashmere content is material because it relates to a characteristic that defines the product at issue, as well as the market in which it is sold.

Moreover, defendants prominently labeled their garments as "Cashmere and Wool," "A Luxurious Blend of Cashmere and Wool," "Cashmere Blend," or "Wool and Cashmere," and their garments were conspicuously advertised in stores and catalogues as "Cashmere Blazers." It seems reasonable to infer from defendants' aggressive marketing strategy highlighting the "cashmere" nature of the blazers that defendants themselves believed cashmere to be an inherent and important characteristic of the blazers.

With respect to their second claim, plaintiffs argue that defendants' misrepresentation of the recycled nature of their cashmere also relates to an inherent characteristic of the garments. To

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or has been made with the intent to deceive, materiality must be demonstrated in order to show that the misrepresentation had some influence on consumers.

substantiate this point, plaintiffs offer the affidavit of Karl Spilhaus, the Institute's president, in which he explains:

> The process of recycling . . . involves the use of machinery to tear apart existing garments, during or after which they are subjected to a wet processing with the resulting wool fibers dried out, frequently carbonized (subjected to heat and sulphuric acid), and then re-used in the manufacture of other fabric.
>
> In the process of tearing apart existing garments, considerable damage is inevitably done to the fibers in those garments, and additional damage is also done by the acid or other chemical treatments applied to them during the recycling process. The result is that recycled fibers frequently have substantial surface damage to their scale structure which effects [sic] their ability to felt, or bind together, thereby effecting [sic] the ability of a recycled fiber fabric to hold together as well or as long as fibers which are being used in the fabric for the first time. Such fabric will be rougher to the touch and lack "handle," plushness or softness normally associated with quality woolen or cashmere products.

Given the degree to which recycled fibers affect the quality and characteristics of a garment, a rational factfinder could conclude that consumers, especially experienced ones like retail stores, would likely be influenced in their purchasing decisions by labeling that gave the false impression that the garments contained virgin cashmere.[11]

In fact, plaintiffs offer anecdotal evidence as corroboration for this very assertion. In January 1996, Saks, one of Harve Benard's largest customers, learned that the cashmere blazers it had purchased from Harve Benard might contain recycled cashmere. Shortly thereafter, Lynne Ronon, the merchandise manager at Saks, met with representatives of Harve Benard to inform them that Saks did not wish to sell garments containing recycled cashmere. After the meeting, Carole Sadler, the associate counsel for Saks, sent Harve Benard a letter restating Saks' position as set forth by Ronon: "Saks does not wish to sell jackets containing recycled cashmere."

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[11] The relevant "consumers" are those groups of people to whom the advertisement was addressed. See Johnson & Johnson Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297 (2d Cir. 1992) (noting that "[t]he question in such cases is -- what does the person to whom the advertisement is addressed find to be the message?") (internal quotations and citations omitted). In this case, the relevant consumers include, but are not limited to, the retail stores that purchased Harve Benard garments instead of buying from Packard's garment manufacturer customers and individual purchasers.

Rather than viewing this anecdote as evidence of how an actual consumer's purchasing decision was influenced by the misrepresentation, defendants draw the opposite conclusion by focusing on Saks' ultimate purchasing decision. Notwithstanding its earlier position, Saks eventually decided to sell Harve Benard garments containing recycled cashmere. Moreover, Sadler testified that Saks' initial refusal to sell recycled cashmere garments was merely a strategic move on an issue "that could ripen into a negotiation or a renegotiation" between the parties.

The problem with defendants' rebuttal argument, however, is that it ignores what a rational juror could find after drawing all reasonable inferences in plaintiffs' favor. Saks' initial refusal to sell the recycled cashmere garments; Saks' belief that the matter could lead to a negotiation; and the actual negotiations that took place before Saks agreed to continue selling the garments are competent evidence from which a reasonable juror could conclude that the issue related to an inherent quality or characteristic of the garment. Indeed, it makes little sense that Saks and Harve Benard would spend so much time and effort resolving a matter they deemed immaterial.

Furthermore, it is important to reiterate, as the caselaw explicitly states, that plaintiffs are not required to present evidence that defendants' misrepresentation actually influenced consumers' purchasing decisions, but that it was <u>likely</u> to in-

fluence them. See Clorox, 228 F.3d at 33 n.6. Given the significant degree to which using recycled fibers adversely impacts the quality, texture, and characteristics of cashmere, and considering Saks' erratic behavior upon learning of the mislabeling, we find that plaintiffs have presented sufficient evidence to demonstrate that defendants' recycled cashmere misrepresentation was material.

C. Consumer Deception

The next element of a false advertising claim under the Lanham Act requires plaintiffs to demonstrate that the alleged misrepresentation deceived a substantial portion of the consuming public. See Clorox, 228 F.3d at 33 n.6.[12] Usually consumer deception is demonstrated through surveys, which establish that consumers were misled by the alleged misrepresentations. See Johnson & Johnson Merck, 960 F.2d at 298. Plaintiff-appellant Packard argues, however, that it does not have to shoulder the burden of presenting this evidence because existing caselaw allows plaintiffs like it who allege claims that are literally false to avail themselves of a presumption of consumer deception. See Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 943 (3d Cir. 1993) (ruling that "a plaintiff must prove either literal falsity or consumer confusion, but not both"); Johnson &

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[12] Since Packard is seeking monetary damages, it must demonstrate that consumers were actually deceived by the misrepresentations. Only plaintiffs seeking injunctive relief face the lesser burden of demonstrating a tendency to deceive. See supra note 9.

Johnson v. GAC Int'l, Inc., 862 F.2d 975, 977 (2d Cir. 1988) ("When a . . . representation is literally or explicitly false, the court may grant relief without reference to the advertisement's impact on the buying public.").

In response, defendants recognize that a presumption of consumer deception is available to plaintiffs seeking injunctive relief for literal falsity claims; however, they argue that the presumption does not apply, without more, to plaintiffs seeking money damages for literal falsity claims.

Though there was once support for the assertion that consumer deception cannot be presumed simply because a plaintiff alleges a literal falsity claim for money damages, see PPX, 818 F.2d at 272 (noting that as of 1987 the presumption had only been applied to literal falsity claims for injunctive relief), it has become the practice of most circuits to apply the presumption to all literal falsity claims. See Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir. 2000) (holding, on a claim for damages and injunctive relief, that "when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers. . . . [However] [p]laintiffs looking to recover monetary damages for false or misleading advertising that is not literally false must prove actual deception"); EFCO Corp. v. Symons Corp., 219 F.3d 734, 740 (8th Cir. 2000) (ruling, on a claim for damages,

that "when an advertisement is literally false . . . the plaintiff need not prove that any of its customers were actually persuaded by the advertising"); Balance, 204 F.3d at 693 (noting that a presumption of consumer deception applies to a literal falsity claim for damages so long as there is other proof of marketplace damages); B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 168 F.3d 967, 971 (7th Cir. 1999) (ruling, on a damages claim, that "[w]here the statement in question is actually false, then the plaintiff need not show that the statement either actually deceived consumers or was likely to do so").

In fact, defendants' argument contradicts this Court's explicit pronouncements on the issue. In assessing whether a Lanham Act claim for injunctive relief and money damages had been properly dismissed, we stated, "If the advertisement is literally false, the court may grant relief without considering evidence of consumer reaction. In the absence of such literal falsity, an additional burden is placed upon plaintiff to show that the advertisement . . . conveys a misleading message to the viewing public." Clorox, 228 F.3d at 33 (internal citations omitted).

Moreover, applying a presumption of consumer deception to all literal falsity claims, irrespective of the type of relief sought, makes sense. When a plaintiff demonstrates that a defendant has made a material misrepresentation that is literally false, there is no need to burden the plaintiff with the onerous task of demonstrating how

consumers perceive the advertising. See Balance Dynamics, 204 F.3d at 693 (noting that "[b]ecause proof of 'actual confusion' may be difficult to obtain, most of the circuits have ruled that when a statement is literally false, a plaintiff need not demonstrate actual customer deception in order to obtain relief under the Lanham Act"). Common sense and practical experience tell us that we can presume, without reservation, that consumers have been deceived when a defendant has explicitly misrepresented a fact that relates to an inherent quality or characteristic of the article sold. To presume as much requires neither a leap of faith nor the creation of any new legal principle.[13]

Because defendants do not dispute that overstating cashmere content is a literal falsity claim, we apply a presumption of consumer deception in plaintiffs' favor on this claim. Based on this presumption, and defendants' failure to present evidence to rebut it, Packard has satisfied its

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[13] Defendants also argue that before the presumption of consumer deception can apply to a literal falsity claim for damages, the plaintiff must demonstrate that the defendant intentionally deceived the consuming public. None of the five circuit cases cited supra, however, speaks of the intent to deceive as a prerequisite to applying a presumption of consumer deception on a literal falsity claim. As discussed in more detail below, the intent to deceive is an independent basis for triggering a presumption of consumer deception. See William H. Morris Co. v. Group W, Inc., 66 F.3d 255, 258 (9th Cir. 1995) (ruling, on an implied falsity claim, that "[i]f [defendant] intentionally misled consumers, we would presume consumers were in fact deceived and [defendant] would have the burden of demonstrating otherwise").

burden of demonstrating consumer deception on its cashmere content claim.

Whether literal falsity is involved in plaintiffs' claim that defendants improperly labeled their goods as cashmere rather than recycled cashmere, however, is a contentious issue. Defendants argue that this claim is, by definition, one of implied falsity -- that is, a representation that is literally true but in context becomes likely to mislead. See Clorox, 228 F.3d at 33 (defining an implied falsity claim as one in which the "advertisement, though explicitly true, nonetheless conveys a misleading message to the viewing public"). As further support for their argument, defendants offer a simple syllogism: all suits based on implied messages are implied falsity claims; since plaintiffs assert that the term "cashmere" on the garments' labels implicitly conveys the false message that the garments contain virgin cashmere, their claim must be one of implicit falsity.

We agree with defendants that normally a claim like plaintiffs', in which the representation at issue is literally true (the garments do contain cashmere as the label states) but is misleading in context (defendants failed to disclose that the cashmere is recycled), is evaluated as an implied falsity claim. See id. However, we disagree with defendants' assertion that all claims that rely on implied messages are necessarily implied falsity claims. In Clorox, this Court noted that "[a]lthough factfinders usually base literal falsity claims upon the explicit claims made by an adver-

tisement, they may also consider any claims the advertisement conveys by 'necessary implication.'" Id. at 34-35. We explained that "[a] claim is conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated." Id. at 35.

After drawing all reasonable inferences in favor of the nonmoving party, a rational factfinder could conclude that plaintiffs' recycled cashmere claim is one of literal falsity. The Wool Products Labeling Act, 15 U.S.C. § 68 et seq., requires recycled garments and fabrics, including cashmere, to be labeled as such. As a result, whenever a label represents that a garment contains the unqualified term "cashmere," the law requires that the garment contain only virgin cashmere. The Act, then, is essentially telling consumers that garments labeled "cashmere" can be presumed to be virgin cashmere "as if it had been explicitly stated." Clorox, 228 F.3d at 35. Plaintiffs also presented evidence demonstrating that experienced retailers, like Saks, were aware of the Act's requirements. Based on this evidence, we conclude that plaintiffs have presented sufficient evidence to demonstrate that consumers would view the term "virgin" as necessarily implicated when a garment was labeled "cashmere."

The district court rejected this argument because "[i]t is at least equally plausible to infer that Congress [in enacting the Wool Product Labeling Act] was concerned that it would be mis-

leading for a seller to fail to distinguish between virgin and recycled cashmere, even though it would not be literally false to do so." The district court's argument, however, substitutes an irrelevant inquiry for the required analysis. Rather than assessing what consumers would necessarily infer from the unqualified term "cashmere" in light of the Act's requirements, the district court delved into issues of congressional intent and statutory interpretation. See Johnson & Johnson Merck, 960 F.2d at 297 ("The question in such cases is -- what does the person to whom the advertisement is addressed find to be the message?"). Because the Act necessarily implies the term "virgin" anytime the unmodified word "cashmere" appears on a garment's label and experienced retailers, like Saks, were aware of the Act's requirements, we rule that plaintiffs' recycled cashmere claim can be reasonably seen as one of literal falsity. Therefore, plaintiffs may benefit from a presumption of consumer deception on this claim.

Even if plaintiffs' recycled cashmere claim did not involve literal falsity, plaintiffs would still be able to avail themselves of a presumption of consumer deception on alternative grounds. It is well established that if there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived. See Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1333 (8th Cir. 1997) (approving of a presumption of consumer deception upon a finding that defendant acted de-

liberately to deceive); see also U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986) (same).

As evidence of defendants' intentional mislabeling of the blazers' recycled cashmere, plaintiffs introduced a letter dated January 13, 1995, addressed to Harve Benard's president, Bernard Holtzman, from one of Harve Benard's testing laboratories. On the top of the letter, there is a handwritten note from "L. Pedell," an agent for Harve Benard, which states, "Also see note from mill below. This is an on-going saga." The note that Pedell is referring to reads, in pertinent part, "FOR YOUR INFO PLS NOTE MILL IS USING RECICLED CHASMERE [sic]."[14] Despite receiving notice that its blazers were being made from recycled cashmere, Harve Benard continued to market its garments without any "recycled" designation, as required by law, until months after the commencement of this lawsuit in 1996. Thus, Harve Benard's unwillingness to comply with the law, despite being on notice of its violation, can be seen as an attempt deliberately to deceive the consuming public.

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[14] Defendants argue that since Holtzman testified that "it is very possible that I didn't get [the letter]," and because there is no evidence to contradict his assertion, it cannot be inferred that he received it. The evidence to cast doubt on Holtzman's testimony, however, comes from his own tongue. He also stated that "I couldn't be sure either way [whether I received the letter]." Given Holtzman's equivocal responses, we find that plaintiffs are entitled to the reasonable inference that a facsimile letter addressed to Holtzman was received by him.

In response, defendants offer several factual and legal arguments, none of which we find persuasive. First, defendants argue that a presumption of consumer deception cannot be triggered on an implied falsity claim, even if there is evidence of an intent to deceive. Defendants' claim, however, is undermined by several circuit cases that have explicitly held otherwise. See Porous, 110 F.3d at 1337 (applying presumption of consumer deception to an implied falsity claim when there is intent to deceive); William H. Morris, 66 F.3d at 258-59 (stating that a presumption of consumer deception applies to an implied falsity claim where there is sufficient evidence of an intent to deceive); Johnson & Johnson Merck, 960 F.2d at 298-99 (same); Resource Developers, 926 F.2d at 140 (same). The justification for applying the presumption whenever there is evidence of intentional deception is perspicuous: "The expenditure by a competitor of substantial funds in an effort to deceive customers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived." U-Haul, 793 F.2d at 1041. This reasoning holds true regardless of whether the claim that plaintiffs allege involves an implied or literal falsity.

Second, defendants argue that the fact that an Italian mill stated that it was using recycled cashmere has little bearing on whether the mill was using cashmere that would be considered recycled under the definitions of the Wool Products Labeling Act. Defendants seem to misunderstand or underestimate the import of the letter. One of

Harve Benard's mills informed the president of the company that its cashmere-blend garments contained recycled fabric. Rather than investigating the matter to determine whether Harve Benard was violating the law by not properly labeling its cashmere as "recycled," Harve Benard did nothing. It did not finally change the garments' labels until more than one year later when plaintiffs sought a temporary restraining order on the issue. One reasonable explanation, which a juror may choose to credit, for Harve Benard's refusal to investigate or act on the letter is that Harve Benard intended to deceive the consuming public about the recycled nature of its cashmere. Cf. Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1133 (4th Cir. 1995) (noting that intent may be inferred from a failure to act).

Lastly, defendants argue that Harve Benard's failure to act on the letter for one year does not meet the intent requirement set forth in applicable precedent. Defendants read Resource Developers, 926 F.2d at 140, as standing for the proposition that a defendant's failure to dispel confusion caused by its advertising circular for four months is insufficient evidence of intent. Since Harve Benard's failure to act is comparable to the defendant's in Resource Developers, defendants conclude that there is insufficient evidence to support a finding of intent.

Even if we were to adopt defendants' reading of Resource Developers, we remain unpersuaded by their argument because the circum-

stances of this case are far more compelling. First, the fact that defendants waited for more than a year before changing the blazers' mislabeling is far more probative of intentional deceit than waiting for four months. Second, when referring to the Italian mill's use of recycled cashmere, Pedell noted on the top of the letter, "This is an on-going saga." Drawing all reasonable inferences in plaintiffs' favor, a rational juror could conclude from this sentence that the recycled cashmere issue had been encountered before and -- as the word "saga" suggests -- on a continuing basis. Because this "saga" probably began or could have begun a considerable amount of time before January 1995, we decline defendants' invitation to place a time constraint on plaintiffs' evidence of intent.

With respect to the Institute's recycled cashmere claim for injunctive relief, the district court dismissed the claim because the Institute failed to demonstrate evidence of consumer deception. Because the foregoing analysis applies with equal force to the Institute's recycled cashmere claim, we rule that the Institute can avail itself of a presumption of consumer deception. Thus, the district court erred in granting defendants' motion for summary judgment on the Institute's recycled cashmere claim.

D. Causation and Damages

Before delving into the merits of plaintiffs' proffered evidence of causation, we address a

threshold evidentiary issue. Defendants argue that since plaintiffs failed to appeal the district court's order striking their experts' reports, plaintiffs have nothing upon which to base a finding of causation. We agree with defendants that plaintiffs did not properly appeal the district court's ruling, but this does not signify that plaintiffs' case on causation necessarily fails.[15] Plaintiffs may still rely on anecdotal statements from prospective customers, evidence of cost differential between fabrics, and factual testimony of expert witnesses to demonstrate causation.

In order to prove causation under § 1125(a) of the Lanham Act, the aggrieved party must demonstrate that the false advertisement actually harmed its business. "A precise showing is not required, and a diversion of sales, for example, would suffice." Quabaug, 567 F.2d at 161 (internal citations omitted).[16]

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[15] Whether plaintiffs will be permitted to present new expert reports on remand is a matter best left for the district court, as we have not been properly briefed on the issue.

[16] Defendants at oral argument suggested that plaintiffs could not be damaged by Harve Benard's alleged mislabeling because the parties operate in different markets: whereas Harve Benard sells finished garments to retailers, Packard sells fabric to manufacturers. Defendants later conceded, however, that if Packard were to demonstrate that manufacturers refused to purchase its fabric because of defendants' false advertising and concomitant low prices, causation would be proved. Thus, the fact that the two parties are in different markets does not affect the analysis, so long as plaintiffs can prove the causal connection between the misrepresentations and the harm sustained.

To satisfy this requirement, plaintiffs present two pieces of interrelated evidence. First, plaintiffs point to Harve Benard's purchase orders which demonstrate that Harve Benard was paying $5 per yard less for the fabric it was using to make its garments than Packard's customers, who were paying for legitimate 10% cashmere fabric. Next, plaintiffs offer uncontradicted evidence that Packard's customers actually reduced their purchases of Packard's cashmere-blend fabric because they could not compete with Harve Benard's lower-priced garments. Specifically, Peter Warshaw, a sales agent for Packard, testified that three of Packard's customers -- Gilmore, RCM, and Perfect Petite -- notified him that they could no longer purchase Packard's cashmere-blend fabric because Harve Benard's lower-priced garments were driving them out of the market. This evidence supports the plaintiffs' claim that Harve Benard's low prices caused Packard lost sales.

The critical question, then, is what enabled Harve Benard to lower its prices to the point that prospective competitors refused to purchase Packard fabric. Based on the evidence presented, a rational factfinder could reasonably infer that the substantial cost savings Harve Benard enjoyed from using non-cashmere or recycled cashmere fabric allowed Harve Benard to lower the price of its blazers, thereby preventing Packard's customers from competing in the market. Indeed, using inexpensive materials that are represented as something more valuable would generally cre-

ate a substantial competitive advantage by undercutting competitors who correctly represent their products. See Camel Hair, 799 F.2d at 13 (approving the district court's commonsense "inference that the sale of cashmere-blend coats which overstated their cashmere content could cause a loss of sales of cashmere-blend coats which correctly stated their cashmere content"). This reasonable inference, to which plaintiffs are entitled at summary judgment, enables plaintiffs to demonstrate the causal link between the harm they suffered and defendants' misrepresentations.

In response, defendants argue that it is unreasonable to infer that Harve Benard's lower fabric costs translated into lower garment prices given that evidence in the record suggests otherwise. In his affidavit, Harve Benard's vice-president Harvey Schutzbank stated that Harve Benard's garment prices would have remained the same even if it had used the more expensive Packard fabric to manufacture its garments. Based on this evidence, Harve Benard claims it would still have enjoyed the same price advantage that prevented Packard's customers from competing in the market even if the garments had been properly labeled and manufactured with legitimate 10% cashmere fabric. In short, defendants cite Schutzbank's affidavit as proof that it was Harve Benard's low prices -- not its mislabeling -- that caused Packard's lost sales.

We agree with defendants that if they were to present undisputed evidence establishing that

their garment prices would have remained the same even if they had used Packard fabric, it would be unreasonable to infer that Harve Benard's lower fabric costs translated into lower garment prices. However, plaintiffs present competent evidence which casts serious doubt on Schutzbank's testimony. Packard's president John Glidden testified to the relationship between fabric cost and garment price:

> Because Harve Benard was not putting the cashmere in the fabric, they had a tremendously reduced cost. . . . [T]he added expense of putting cashmere in a garment or in a fabric increases the garment's cost; and when [Packard] legitimately labeled [its] fabrics, [the fabrics] were too expensive for the marketplace which Harve Benard was selling to.

Moreover, Warshaw, who has years of experience working with garment manufacturers, testified that "Harve Benard had an unfair competitive advantage in fabric that is the major component of a garment . . . . [B]y far and away the largest component of the total costs of a garment is the fabric." (emphasis added). He also testified to Harve Benard's comparative advantage:

> [T]he garment manufacturers that are available to compete with Harve Benard are savvy, smart, sharp manufacturers who have at their dis-

> posal cheap labor, cheap trim, cheap transportation. They have available to them the same range of possibilities for plugging in to a garment, except that if those sharp competitors use a Packard product that's $11.25, they're going to get blown out of the water by Harve Benard[']s use of] inexpensive [] fabric.

After weighing all of this evidence, a rational jury could choose to discredit Schutzbank's affidavit, especially considering (1) the commonsense inference that a lower fabric cost translates into a price advantage; (2) the fact that Schutzbank does not provide any quantitative analysis to substantiate his bald assertion that the garments' prices would have remained the same even if Harve Benard were to have used the more expensive Packard fabric; (3) several "savvy, smart, sharp" garment manufacturers could not do what Harve Benard claims it can -- that is, use Packard fabric and still keep its low prices; and (4) two of plaintiffs' witnesses assert that fabric cost has a substantial impact on garment price.

In the end, the parties present witnesses who hold inconsistent positions on a crucial issue of fact. Rather than weighing in on the matter, we conclude that this dispute is one which a jury is best suited to resolve.

III.

The district court dismissed plaintiffs' state law claims because it found that since plaintiffs were unable to satisfy the requirements of a Lanham Act claim, they would not be able to prove their state law claims, as the two have overlapping requirements.

Because the district court erred in concluding that plaintiffs' proof was insufficient to qualify for relief under the Lanham Act, we reverse its decision to dismiss plaintiffs' state law claims.

Conclusion

Based on the foregoing analysis, a reasonable factfinder could conclude that the defendants' material mislabeling of their garments deceived the consuming public, enabled defendants to lower their garment prices, and caused Packard to lose sales. For these reasons, we find summary judgment inappropriate, reverse the district court's judgment, and remand the case for action consistent with this opinion.

Reversed and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE and L.W. PACKARD & CO., Plaintiffs,	)	
v.	)	96cv10127-RCL
SAKS FIFTH AVENUE, THE MAY COMPANY, FILENE'S BASEMENT, INC., HARVE BENARD, LTD.,) and WEINTRAUB & SONS, INC., Defendants.	)	

REPORT AND RECOMMENDATION REGARDING HARVE BENARD'S MOTION FOR SUMMARY JUDGMENT (DOCKET NO. 328)

KAROL, U.S.M.J., **JULY 1, 1999**

This is an action by two plaintiffs for false advertising in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (West 1998), the Massachusetts Unfair and Deceptive Trade Practices Act, G.L. c. 93A (West 1997) ("chapter 93A"), and the common law of unfair competition. One

Plaintiff, the Cashmere & Camel Hair Manufacturers Institute ("CCMI"), is a trade association. The other, L.W. Packard & Co. ("LWP"), is a member of CCMI. LWP and CCMI originally sued five defendants, only three of whom remain in the case following a settlement between Plaintiffs and two of the original Defendants - The May Company and Weintraub & Sons, Inc. The three remaining Defendants are Harve Benard, Ltd. ("HB"), Saks Fifth Avenue ("SFA"), and Filene's Basement, Inc. ("FB").

CCMI's members include sellers and marketers of cashmere and cashmere blend cloth and garments. The association is dedicated to the goal of preserving the name and reputation of cashmere as a specialty fiber. LWP manufactures, among other things, cashmere and cashmere blend fabric. HB is a garment manufacturer. Since 1993, it has been manufacturing and selling to retailers a line of woman's blazers that, according to their label, are made out of a fabric blend consisting of 70 percent wool, 20 percent nylon, and 10 percent cashmere ("70/20/10"). SFA and FB are retailers who carry and sell the HB line of blazers.

CCMI and LWP contend that, from 1993 to at least 1997, HB's blazers were materially mislabeled in two distinct respects. First, they claim that the fabric that went into the HB blazers contained significantly less than 10 percent cashmere. Second, they claim that any cashmere that the blazers did contain was not virgin, as the word "cashmere" in the garment label implied, but recycled. Recycled cashmere is manufactured

through the physical or chemical deconstruction of pre-existing cashmere fabric. CCMI seeks a permanent injunction against future mislabeling, while LWP seeks damages on the theory that it lost sales of genuine, virgin 70/20/10 fabric as a result of the manufacture and sale by HB, and the sale by SFA and FB, to consumers of the falsely labeled blazers. Pending before the court is HB's motion for summary judgment (Docket No. 328), in which SFA and FB have both joined, and motions by FB to strike the reports of Plaintiffs' two damage experts (Docket Nos. 326 & 337), in which HB and SFA have both joined. This Report and Recommendation addresses the motion for summary judgment. A companion memorandum and order issued today addresses the motions to strike the expert reports.

For reasons stated below, I recommend that the motion for summary judgment be **ALLOWED** as to LWP's claim for damages and **DENIED WITHOUT PREJUDICE** pending further development of the record, as to CCMI's claim for injunctive relief.

I. Background and Prior Proceedings

Plaintiffs commenced this lawsuit on January 24, 1996. Complaint and Jury Demand, Docket No. 1. CCMI included in its prayer for relief a request for a preliminary injunction enjoining Defendants from continuing to sell the allegedly mislabeled HB blazers. At the time, HB and the retailers that carried the blazers were close to selling out the 1995 line of blazers and were

about to commence the manufacture and sale of their Fall 1996 line. During the course of an extensive preliminary injunction hearing that commenced in the spring of 1996, evidence was presented to the effect that some or all of the cashmere in the HB blazers, if any, was recycled, rather than manufactured from the incorporation of virgin cashmere fibers into the 70/20/10 fabric. Without acknowledging that its existing label violated section 43(a) of the Lanham Act, or any other law, HB voluntarily agreed to label its 1996 and subsequent lines of blazers as being made from "recycled cashmere," rather than from "cashmere." As far as the record reveals, HB has adhered to this agreement to the present day. See Affidavit of Harvey Schutzbank in Support of Harve Benard's Motion for Summary Judgment ("Schutzbank Aff."), Docket No. 335, ¶ 2. Thus, for purposes of the present motion, I shall assume that, commencing with its 1996 line of blazers, HB has accurately labeled its garments as containing recycled cashmere. Among the remaining questions, however, is whether the total cashmere content of the 70/20/10 blazers, including recycled and virgin cashmere, if any, is at least 10 percent, as the label claims. For purposes of the pending summary judgment motion, Defendants concede that this issue is both material and genuinely in dispute. Harve Benard's Memorandum in Support of its Motion for Summary Judgment ("HB Mem."), Docket No. 330, 1 n.1. Defendants also appear to concede that there is a genuine, material dispute about whether the failure to label the pre-1996 line of blazers as

containing recycled cashmere was a form of mislabeling. HB Mem. at 1 n.2. I will therefore assume that, through at least 1997, HB has overstated the cashmere content of its 70/20/10 blazers and that, from 1993 through 1995, it mislabeled its blazers as containing "cashmere" rather than "recycled cashmere."

II. Substantive Legal Framework: The Lanham Act[1]

Section 43(a) of the Lanham Act creates a federal cause of action in favor of victims of false advertising. It provides, in pertinent part:

> Any person who, on or in connection with any goods or services, ..., uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any per-

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[1] As discussed below in part VI, if Plaintiffs have failed to create a genuine dispute concerning their right to relief under the Lanham Act, then their claims under chapter 93A and the common law of unfair competition must also fail.

> son who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B). As Plaintiffs concede in their memorandum, to sustain a claim under this provision, the claimant must allege and prove at least the following three elements: (1) the accused party made false or deceptive advertisements or representations to customers; (2) those advertisements or representations deceived a significant portion of the consuming public;[2] and (3) the claimant was injured by the accused party's conduct. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Pls' Opp."), Docket No. 339, 9 (citing Brown v. Armstrong, 957 F. Supp.

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[2] In their memorandum, Plaintiffs expressly acknowledge that a "significant portion" of the consuming public must be deceived Pls' Opp. at 9. At oral argument, however, Plaintiffs took issue with this proposition and seemed to maintain that it would be enough if as few as a single person were deceived. This apparent repudiation of their memorandum comes too late to be considered, however, and, in any event, is clearly incorrect as a matter of law. See, e.g., William H. Morris Co. v. Group W, Inc., 66 F.3d 255, 257-58 (9th Cir. 1995) (8 of 300 pharmacists not a "significant portion" of relevant consumers); Johnson & Johnson-Merck Cons. Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc., 19 F.3d 125, 133-34 & n.14 (3d Cir. 1994) (7.5 percent of advertising recipients deceived insufficient to constitute "a statistically significant part of the commercial audience"); J. THOMAS McCARTHY, McCARTHY ON TRADEMARKS & UNFAIR COMPETITION, § 27:57 (4th ed. 1996) ("The required number of persons has been characterized as 'appreciable,' 'statistically significant,' 'significant portion,' or 'a substantial proportion of the intended audience.'"); see also Gillette Co. v. Norelco Cons. Prods. Co., 946 F. Supp. 115, 128 (D. Mass. 1996) (Lindsay, J.) ("A plaintiff has carried its burden to show that consumers are confused if a substantial, or not insubstantial, number of consumers are shown to hold the confused view.").

1293, 1301 (D. Mass. 1996), aff'd, 129 F.3d 1252 (1st Cir. 1997)). It is appropriate to pause at this point and consider several legal issues – some disputed, some not – subsumed in this statement of elements.

1. The second element, often referred to as the "materiality" element, includes two components. First, the false or deceptive claims must have deceived, or must threaten to deceive, a significant number of persons, and, second, the deception must have influenced or be likely to influence those persons' purchasing decisions. See, e.g., U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922 (3d Cir. 1990).

2. The materiality element and the third, or "causation" element although sometimes conflated, are two distinct elements. A hypothetical example might best illustrate the distinction. A false advertising claim might be material in the sense that it causes a substantial number of people to purchase the advertised product, but it might not cause any damage to a plaintiff, if, but for the false advertising, the deceived purchasers would still not have purchased the plaintiff's product. For example, suppose the advertisement is for artificial, cubic zirconium "diamonds" and the false claim is that the artificial gems are such precise reproductions that only an expert can distinguish them from real diamonds. The false claim would be material if a substantial number of consumers were induced by it to purchase the artificial gems. But the advertisement would not necessarily cause injury to sellers of genuine diamonds, since it cannot be assumed that per-

sons who were willing to spend a nominal sum for costume jewelry would, but for the false claim, be willing to spend an exponentially greater sum for the genuine article.

Conversely, a seller who makes false advertising claims might cause injury to a competitor even though his false claims are not material. For example, a manufacturer of a golf club might falsely claim that its club was endorsed by a particular golfing celebrity, and the evidence might prove that sales of that club came at the expense of sales of a competing company's club. Yet, if survey or other evidence proved that the false celebrity endorsement played no role in the purchasing decision of any buyer, the false endorsement claim would be immaterial, even though sales of the falsely endorsed club came at the expense of the competing product.

Materiality and causation are thus two distinct elements, both of which must be proved if the claimant is to prevail.

3. Although materiality is often proved by survey or other direct evidence, there are some circumstances under which it may be presumed. Those circumstances depend upon the type of relief a claimant pursues. If the claimant seeks injunctive relief, materiality will be presumed if the challenged claim is literally false. E.g., Camel Hair and Cashmere Inst. v. Associated Dry Goods Corp. ("CHCI I"), 799 F.2d 6, 15 (1st Cir. 1986). This rule lowers the hurdle for injunctive relief, for the immediate benefit of the consuming public, by presuming that literally false statements are materially deceptive. See id. (citing Black

Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 753 n.7 (8th Cir. 1980)). On the other hand, if a claimant is seeking damages, materiality (but not causation) will be presumed only if the claim is willfully and egregiously false or misleading. E.g., Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134, 140 (2d Cir. 1991); U-Haul Int'l. Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986). The rationale for this rule is that it may be difficult for a claimant to prove material consumer deception when a competitor has expended significant sums of money for the very purpose of deceiving consumers and influencing their purchasing decisions. U-Haul, 793 F.2d at 1041 ("He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.").

For the purpose of evaluating CCMI's request for injunctive relief, there is no dispute that a claim that Defendants misstated the percentage quantity of cashmere in the HB blazers is a claim of literal falsity, entitling Plaintiffs to invoke the presumption of materiality. The picture is less clear concerning the claim that Defendants falsely labeled "recycled cashmere" as "cashmere." In their memorandum, Plaintiffs seemed to concede that such a claim is not one of literal falsity, but rather one of deception, to which the presumption would not apply. Thus, they stated that "the type of fiber used (in the HB blazers) was 'recycled' rather than virgin as the defendants' [sic] implied." Pls' Mem. at 11. An "implied" falsehood is a claim that one ordinarily thinks of as being mis-

leading rather than literally false. Yet, at oral argument, Plaintiffs took the position that it is literally false to claim that recycled cashmere is "cashmere." I reject Plaintiffs' argument for two reasons.

First, it comes too late. It is unfair to the court and to Defendants for Plaintiffs to reveal for the first time at a hearing an argument that they could have, but for some reason failed to, present in their memorandum. Second, Plaintiffs' argument is unpersuasive. In ordinary parlance, recycled cashmere is a type of cashmere, just as a used car is a type of car and a rebuilt engine is a type of engine. Although it may well be misleading, deceptive, and even actionable for a seller of a used car or rebuilt engine to fail to describe his product as such, it would not be literally false for him to refer to his product as a car or engine.[3]

The only support Plaintiffs present for their argument that it is literally false to refer to recycled cashmere as "cashmere" is the fact that the Wool Products Labeling Act, 15 U.S.C. § 68 *et seq.* (West 1994) ("WPLA"), imposes a requirement on sellers of certain types of recycled fabric, including cashmere, that they label recycled products as being "recycled." From this, Plaintiffs infer that Congress has decreed that it is literally false for sellers not to do so. Plaintiffs' argument is not

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[3] The result might be different if there were affirmative evidence that persons in the trade simply did not consider used cars or rebuilt engines to be cars or engines, respectively. We need not be concerned about this possible qualification, however, because there is no evidence in the summary judgment record in this case that persons in the trade do not consider recycled cashmere to be a type of cashmere.

convincing. In the first place, the WPLA simply does not address the issue of whether it is literally false, or merely misleading, to fail to distinguish between virgin and recycled fabrics, and it would be a mistake to read into the statute more than is there. Moreover, if one were to draw any inference about Congress' intent or understanding, it is at least equally plausible to infer that Congress was concerned that it would be *misleading* for a seller to fail to distinguish between virgin and recycled fabric, even though it would not be literally false to fail to do so. Indeed, the latter inference is arguably more likely because there would have been no need for Congress to enact the WPLA's recycling provision if it were literally false for sellers to fail to distinguish between recycled and virgin fabric.

For all these reasons, I conclude that, while it may be misleading and even actionable to refer to recycled cashmere as "cashmere," it is not literally false to do so. Therefore, the presumption of materiality does not apply to Defendants' use of the word "cashmere" to describe the recycled fabric in HB's pre-1996 line of blazers.

III. Statement of the Issues

Defendants seek summary judgment as to LWP's claim for damages on the ground that Plaintiffs have failed to adduce sufficient evidence of materiality or causation to create a genuine dispute regarding either of those two elements. E.g., HB Mem. at 1. Plaintiffs respond that they have either adduced sufficient evidence to create

a genuine dispute regarding both elements, or that they are entitled to rely on a presumption to satisfy their burden. The specific portions of the summary judgment record on which the parties rely will be considered below as is appropriate.

With respect to CCMI's claim for injunctive relief, Defendants seek summary judgment on the ground that any such claim is moot, in view of the fact that (1) since the 1996 fashion season, all HB blazers have been labeled as containing recycled cashmere and (2) since 1997 the cloth that has gone into HB's blazers has been subject to a new and more comprehensive testing regime that employs testing laboratories endorsed by Plaintiffs themselves. HB Mem. at 19 & n.29.

IV. The Summary Judgment Standard

The standard for summary judgment is familiar. Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). At the outset, the moving party must aver that there is an absence of evidence to support the nonmoving party's position. Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990). To avoid summary judgment, the opposing party must produce affirmative evidence demonstrating a genuine issue for trial. Id.; see Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991). "[T]he nonmovant may not rest upon mere allegations, but must adduce specific provable

facts demonstrating that there is a triable issue." Brennan v. Hendrigan, 888 F.2d 189, 191 (1st Cir. 1989). Nor may the opposing party "derail summary judgment by the primitive expedient of insisting that his opponent's evidence should be disbelieved." Abbott v. Bragdon, 107 F.3d 934, 942 (1st Cir. 1997), vacated, 524 U.S. 624, on remand, 163 F.2d 87 (1st Cir. 1998), cert. denied, 119 S. Ct. 1805 (1999). While summary judgment should be used sparingly where motive, intent, or state of mind are at issue, it is nevertheless available where a plaintiff "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). In reviewing the nonmovant's case, "the court must look at the record in the light most favorable to the party opposing the motion and must indulge all inferences favorable to that party," Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir. 1983); see Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 181 (1st Cir. 1989), subject, nevertheless, to the caveat that the court "must disregard improbable or overly attenuated inferences, unsupported conclusions, and rank speculation." Abbott, 107 F.3d at 938.

V. Analysis of the Lanham Act Claim

A. *Materiality*

1. Presumption of Materiality

Because the presumption of materiality varies depending on whether the claim is one for injunctive relief or one for damages, we must examine these two types of claims separately in evaluating Defendants' contention that the record is devoid of evidence of materiality.

(a) Injunctive Relief

Little need be said concerning Defendants' contention that they are entitled to summary judgment on Plaintiffs' claim for injunctive relief on the ground that the summary judgment record is devoid of evidence that any claim for false advertising was material. Putting aside the claim that Defendants falsely implied that the HB blazers contained virgin cashmere, Defendants have conceded for purposes of the present motion that the HB blazer labels overstated the blazers' percentage cashmere content. HB Mem. at 1 n.1. To overstate the percentage cashmere content of a garment is to make a literally false claim, thus triggering the presumption of materiality for purposes of Plaintiffs' claim for injunctive relief. CHCI I, 799 F.2d at 15. Therefore, there is no need to consider the question whether there is actual evidence of materiality. See id. Based on the presumption alone, Defendants' motion for sum-

mary judgment should be denied, to the extent it is based on the argument that Plaintiffs' claim for injunctive relief fails to satisfy the second element of a claim under section 43(a) of the Lanham Act.[4]

(b) Damages

The presumption of materiality applies to a claim for damages if Defendants made a false claim with the deliberate intent to deceive. E.g., Resource Developers, 926 F.2d at 140. In applying this standard, we must consider separately Plaintiffs' two mislabeling claims: (1) that the Defendants overstated the cashmere content of the HB blazers and (2) that HB failed to specify that the cashmere in its blazers, if any, was recycled.

Insofar as Plaintiffs base their damage claim on the assertion that Defendants misstated the cashmere content of the HB blazers, there is no evidence that any Defendant intended to deceive any customer. To the contrary, the only evidence in the summary judgment record on this point is to the effect that Defendants acted in good faith. Specifically, evidence in the summary judgment record reveals that, through 1996, neither HB. nor any of its customers, including SFA and FB, had any substantial basis to disbelieve the certifications by HB's fabric supplier that the cloth HB was purchasing contained 70 percent wool, 20 percent nylon, and 10 percent cashmere. Indeed, HB did not rely solely on such certifica-

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[4] I will consider below in part VII Defendants' alternative argument that Plaintiffs' claim for injunctive relief should be denied as moot.

tions by its supplier; it engaged many reputable, independent laboratories to confirm the accuracy of these certifications, and the reports of those laboratories did so with few if any exceptions. Transcript of Preliminary Injunction Hearing, July 3, 1996 ("P.I. Tr."), attached as Ex. 3 to Declaration of Michael J. Summersgill in Support of Harve Benard's Motion for Summary Judgment ("Summersgill Decl."), Docket No. 357, at 9, 11, 13. The only laboratory that consistently raised questions about the accuracy of the certifications was the *Deutsches Wollforschungsinstitui* ("DWI"),[5] which Plaintiffs had retained as their expert witness in this case.[6] DWI operated under the supervision of Dr. Franz-Josef Wortmann. Dr. Wortmann employed a methodology that he personally developed, based upon the use of an electron microscope to measure the cuticle scale height of the fibers being tested. P.I. Tr. at 5. This methodology was relatively new in 1996. It had not been accepted by any of the world's standard setting organizations, and it was not without responsible critics. Id. at 6-9. This is not to say that Dr. Wortmann's methodology lacked scientific reliability; it is to say, however, that the existence of an intent by Defendants to deceive the public cannot be inferred merely from their decision to rely on reputable, independent laboratories that used standard and accepted testing methodologies rather than the new,

[5] German Wool Research Institute

[6] Plaintiffs also presented at the preliminary injunction hearing the testimony of another expert witness, Professor Kenneth Langley, who also claimed that HB overstated the cashmere content of its blazers.

gies rather than the new, nonstandard methodology favored by Plaintiffs' expert.

It is even more difficult to draw an inference of bad faith with respect to the post-1996 lines of HB blazers. Beginning in 1997, HB implemented a new testing regime that was more rigorous that the regime in place through 1996. According to the unchallenged claim of HB's counsel at oral argument, the new regime includes, in addition to other traditional testing methodologies, the use of Dr. Wortmann's cuticle scale height approach, as applied by testing laboratories endorsed by plaintiffs themselves. Transcript of Hearing on Motion for Summary Judgment ("S.J. Tr."), May 21, 1999, Docket No. 364, at 36. Although it always remains a possibility that a given laboratory will mistakenly certify as acceptable a sample of fabric that in fact contains less than 10 percent cashmere, there is even less basis in the present record to infer an intent to deceive concerning the cashmere content of the post-1996 line of blazers than there was with respect to earlier lines.

Whether an intent to deceive may be inferred from evidence in the record concerning HB's representations regarding recycled cashmere is a much closer question. The analysis begins with the premise, apparently accepted by Defendants for purposes of the present motion, that a factfinder might rationally conclude that the use of the term "cashmere" to describe recycled cashmere is misleading. The question remains, however, whether evidence in the summary judgment record will support a finding that HB's use of such term involved a sufficiently egregious

attempt by it to mislead consumers or its own retail customers to warrant the invocation of the presumption of materiality.[7] The only evidence that might support such a finding is a letter dated January 13, 1995, to HB's President, Bernard Holtzman, from one of HB's Italian testing laboratories. Attached as Ex. 1 to Declaration of Edward W. Little, Jr. in Support of Plaintiff's Opposition to Defendants' Motions for Summary Judgment ("Little Decl."), Docket No. 341. The letter, among other things, confirmed that a particular fabric sample the laboratory had tested contained 13.9 percent cashmere, but it went on to advise HB that the tested cashmere was "recicled" [sic]. Id. It may be inferred that HB received the letter, and, therefore, it may also be inferred that HB was at least on inquiry notice as early as January 1995 that the cashmere in its blazers was not virgin, but recycled. Plaintiffs argue that, if it were acting in good faith, HB would have immediately either inquired further, demanded that its supplier use only virgin cashmere, or begun labeling its blazers as containing recycled cashmere. Its failure to do any of these things until the spring of 1996 is evidence, Plaintiffs insist, of a wilful and egregious intent by HB to deceive its customers.

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[7] There is certainly no evidence in the summary judgment record that either SFA or FB intended to deceive consumers through the use of the term "cashmere" to describe recycled cashmere. If anything, SFA and FB would appear to be the victims of such a misrepresentation by HB, if any, rather than the perpetrators.

A comparison of this case with the leading cases in which the presumption of materiality applied due to instances of wilful and egregious deception demonstrates why Plaintiffs' argument, while not frivolous, must be rejected.

The first prominent decision in this area was U-Haul. In that case, the plaintiff, U-Haul International, Inc. ("U-Haul"), was the umbrella corporation of the nation's largest organization involved in the rental of trucks to consumers for one-way use in household moving. The defendant, Jartran, Inc. ("Jartran"), was a recently formed corporation that sought to compete with U-Haul. In an attempt to make a bold and dramatic entry into the market, it launched a $6,000,000 advertising campaign which, while it did not name U-Haul directly, was clearly aimed at that dominant competitor. The advertisements, 2,000 of which appeared nationwide over the course of a sixteen-month period, featured a series of price and product comparisons between Jartran and U-Haul. Those advertisements were riddled with egregiously false and misleading claims, among which were the following:

- In comparing its rates to U-Haul's, Jartran failed to disclose that the selective rates that appeared in its advertisements were special promotional rates that were not regularly available; in fact, most Jartran rental transactions were at rates that exceeded the advertised promotional rates;

- Jartran deliberately overstated U-Haul's comparative rates by knowingly including certain

surcharges that U-Haul rarely imposed and that Jartran imposed on the same basis;

- Jartran falsely claimed that the low rates it quoted for rental to selected cities were typical of the rates it charged for rental to all cities; in fact, it was Jartran's corporate policy to set rates *above* those of its competitors;

- Jartran knew but failed to acknowledge that it was U-Haul's policy to meet the lower prices of any competitor;

- Jartran visually depicted U-Haul's trucks in a distorted manner to make them appear smaller and less attractive than Jartran's; and

- Jartran made false and misleading comparisons between the gas mileage that customers could obtain on its trucks and U-Haul's and made false claims to the effect that it guaranteed a certain gas mileage.

See U-Haul Int'l. Inc. v. Jartran, Inc., 601 F. Supp. 1140, 1147-48 (D. Ariz. 1984); U-Haul Int'l, Inc. v. Jartran, Inc., 522 F. Supp. 1238 (D. Ariz. 1981) (Memorandum and Order on Motion for Preliminary Injunction).

Based on these findings and on evidence (including industry awards and boasts by Jartran executives) establishing the vast scope and effectiveness of the advertisements, the district court concluded that it could presume that a significant number of consumers were deceived by the advertisements and induced by the egregiously false comparisons within them to rent Jartran rather than U-Haul trucks. In affirming, the Ninth Circuit stated:

> The expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived. He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.

793 F.2d at 1041.

Approximately one year later, the Second Circuit issued its decision in PPX Enterprises v. Audiofidelity Enterprises, 818 F.2d 266 (2nd Cir. 1987). In PPX Enterprises, the defendant advertised eight record albums as featuring performances by the late rock and roll performer, Jimi Hendrix. In fact, Jimi Hendrix either did not appear at all on the albums, or he appeared merely as a background performer or session player. The court characterized the defendant's false advertising as "egregious" and as "patently fraudulent." 818 F.2d at 272-273. It further held that "the advertising accompanying those products was the vehicle employed to perpetrate the fraud." Id. at 273. On that basis, the court held that consumer deception could be presumed.[8]

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[8] There is some suggestion in PPX Enterprises that the presumption of materiality might apply in any case involving literally false advertising, whether the relief sought was injunctive or monetary and without regard to the defendant's state of mind. See 818 F.2d at 272 ("We perceive no reason why the same logic [that supports the use of the presumption in cases where injunctive relief is sought) should not apply in regard to claims for damages,

Unlike the situation here, where, some three years after it began marketing its blazers, HB was put on inquiry notice of a potential labeling problem that it did nothing to create and of which it had no prior notice, the defendants in both U-Haul and PPX Enterprises were the moving forces behind an egregious and well-planned scheme to defraud the public. Moreover, those defendants spent substantial sums to accomplish their fraudulent purposes. This is what prompted the Ninth Circuit to remark in U-Haul that "[t]he expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, be-

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given the circumstances of this case."). In a later case, however, Resource Developers v. Statue of Liberty-Ellis Island Foundation, 926 F.2d 134 (2nd Cir. 1991), the court gave further meaning to the phrase "given the circumstances of this case." It highlighted the fact that the defendant's conduct in PPX Enterprises was "intentionally deceptive," 926 F.2d at 140, and opined that the presumption of materiality "applies equally to any situation where a plaintiff adequately demonstrates that a defendant has intentionally set out to deceive the public." Id. It went on to hold that:

> Once it is shown that a defendant *deliberately engaged* in a deceptive commercial practice, we agree that a powerful inference may be drawn that the defendant has succeeded in confusing the public. Therefore, upon a proper showing of such *deliberate conduct*, the burden shifts to the defendant to demonstrate the absence of consumer confusion.

Id. (emphasis supplied). Resource Developers thus makes clear that a defendant's intent is indeed a critical consideration, at least where a plaintiff seeks to apply the presumption of materiality in an action for damages.

ing deceived." 793 F.2d at 1041. In short, the defendants' active participation in the fraudulent scheme in U-Haul and PPX Enterprises was both quantitatively and qualitatively of a different order of magnitude than HB's passive role here.

It is also instructive to compare the present case to Resource Developers, a case in which the Second Circuit endorsed the reasoning of U-Haul but declined an invitation to apply its teachings. See Resource Developers, 926 F.2d at 141. In Resource Developers, the defendant, a seller of American flags, mistakenly believed that it was about to enter into a business relationship that would have resulted in its becoming associated with a private foundation involved in raising funds to restore the Statue of Liberty. Based on this mistaken belief, it prematurely mailed a biannual advertising circular to 4,500 of its regular customers that falsely implied that such a relationship already existed. One month later, the deal that would have created the association fell through. The defendant waited some four months, however, before notifying its customers that, contrary to the implication in its advertising circular, its products were not in fact endorsed by the foundation. The plaintiff, an exclusive licensee of the foundation, sued the defendant for, inter alia, false advertising, and it argued that the presumption of materiality applied to defendant's deceptive conduct. The district court rejected the plaintiff's argument and, instead, granted summary judgment to the defendant. The Second Circuit affirmed. It held that the plaintiff s attempt to "ascribe ... a bad motive" to the defen-

dant "rests only upon speculation and conjecture. We have not hesitated to affirm a summary judgment when the only proof proffered in opposition amounts to nothing more than speculation and conjecture." Id. The court acknowledged that summary judgment should be used sparingly where state of mind was at issue, but it also expressed concern that "the summary judgment rule would be rendered sterile ... if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." Id. (quoting Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1984)).

So it is here. Just as the defendant's failure in Resource Developers for some four months to dispel the confusion caused by its advertising circular was not egregious enough to defeat summary judgment, HB's failure for a single selling season to respond to an offhand observation by a testing company that a sample of fabric contained recycled cashmere does not warrant an inference that HB deliberately set out to defraud the public. At most, it indicates inattention or carelessness by HB, but neither is enough to invoke an infrequently-used presumption that applies only when a defendant spends substantial sums for the intended purpose of perpetrating an egregious fraud.

Because the presumption of materiality does not apply to either of the alleged misrepresentations that underlie LWP's claim for damages, LWP must, to defeat summary judgment, come forward with actual evidence of consumer decep-

tion and reliance. It is that subject to which I will now turn.

2. Actual Evidence of Materiality

During the course of discovery, Defendants invoked FED. R. CIV. P. 30(b)(6) to depose the LWP witnesses most knowledgeable about the effect of HB's alleged mislabeling on customers' purchasing decisions. See Notice of Taking Deposition, attached as Ex. B to Harve Benard's Motion to Strike the Expert Report of Mr. James D. McEwen, Docket No. 305 (requesting that LWP designate a witness to testify on "any marketing studies performed by Packard or any other information in Packard's possession that ... relate to consumer demand for and the nature of and substitutability between wool and low cashmere-blend blazers, concern customer preferences related to recycled wool and cashmere products; concern the role of brandnames in consumer purchasing decisions with respect to women's blazers; and/or concern sales trends of low cashmere blend and 100% wool products."). LWT presented two witnesses in response: its President, John Glidden, and its Vice President for Finance, James McEwen. With one possible exception, discussed below, neither deponent was able to identify a single customer whose purchasing decision was or may have been affected by the alleged mislabeling. Typical of the questions and answers were the following:

Q. What evidence does Packard have showing that Harve Benard's alleged mislabeling has affected consumer decisions?

Glidden: I can think of no evidence right now.

...

Q. Let's focus on Harve Benard's pre-1996 jackets. What evidence does Packard have that any customers would not have purchased the pre-1996 Harve Benard jackets if they had been labeled recycled?

Glidden: The only evidence we have is the Saks position where they would not sell recycled product in their stores.

...

Q. Turning your attention to the Harve Benard 1996/1997 jackets, what evidence does Packard have indicating that any customer would not have purchased the jackets if they had been labeled as containing less than 10 percent cashmere?

Glidden: I have no evidence that comes to mind right now.

Q. What evidence does Packard have indicating that any customer would not have purchased the 1996/1997 jackets if they had

been labeled as containing zero percent cashmere?

Glidden: I have no evidence that comes to mind right now.

Q. What percent of Harve Benard's customers bought the 1996/1997 jackets because of the Harve Benard name?

Glidden: I have no knowledge of that.

Q. Does anyone at Packard have any knowledge of that?

Glidden: I do not believe so.

Q. What percent bought the 1996/1997 jackets because of Harve Benard's attractive styling?

Glidden: I know of no way to make that analysis.

30(b)(6) Deposition of L.W. Packard & Co. by John Lawson Glidden Sr. ("Glidden Dep."), attached as Ex. 1 to Summersgill Decl., 158-162.

Q. What evidence does -- what specific evidence does Packard have showing that Harve Benard's alleged mislabeling has affected consumer decisions?

McEwen: None that I know of.

Q. Has Packard ever conducted a consumer survey to determine whether Harve Benard's alleged

mislabeling has had any influence on customer purchasing decisions?

McEwen: No.

...

Q. Can you identify any specific consumers who would not have bought Harve Benard's goods were it not for the alleged mislabeling?

McEwen: No.

Q. What evidence does Packard have that any customer would not have purchased a Harve Benard pre-1996 blazer if it had been recycled?

McEwen: I don't know.

Q. Does Packard have any evidence to support that contention?

McEwen: No.

Q. ... What percent of Harve Benard's customers bought the low cashmere jackets primarily because of the Harve Benard name rather than because of any recycled content?

McEwen: I don't know.

Q. What percent of customers bought the Harve Benard jackets because of the attractive styling?

McEwen: I don't know.

Deposition of L.W. Packard & Co. by its designee James D. McEwen (McEwen Dep.), attached as Ex. 6 to Summersgill Decl., 55-57.

Q. Turning your attention to Harve Benard's pre- 1 996 line, what evidence does Packard have indicating that any customer would not have purchased the jacket if it had been labeled as containing less than 10 percent cashmere?

McEwen: It has no evidence.

Q. What percent of Harve Benard's customers bought the low cashmere jackets primarily, again pre-1996 line, primarily because of the Harve Benard name or other than because of any fabric content?

McEwen: I don't know.

Q. What percent bought because of the attractive styling?

McEwen: I don't know.

Q. Turning to the 1996 and the lines thereafter, what evidence does Packard have indicating that any

customer would not have purchased the jacket or the jackets if they had been labeled as containing less than 10 percent cashmere?

McEwen: We don't have any evidence.

Q. What evidence does Packard have indicating that any customer would not have purchased the jackets if they had been labeled as containing even zero percent cashmere?

McEwen: We don't have any evidence.

Q. What percent of customers bought the 1996 and 1997 lines because of the Harve Benard name?

McEwen: I don't know.

Q. What percent bought the Harve Benard 1996 and 1997 lines because of Harve Benard's attractive styling?

McEwen: I don't know.

McEwen Dep. at 88-89.

Thus, the only evidence that LWP's designated representatives could cite to show that customers were deceived by and relied upon Defendants' misrepresentations was a purported Position taken by SFA that "they would not sell recycled product in their stores." Glidden Dep. at 160. This claim relates to a letter dated January 22, 1996, from Carole P. Sadler, Associate Coun-

sel of SFA, to Jonathan R. Tillem, counsel to HB. Attached as Ex. 2 to Tab 1, Little Decl.. In the letter, Ms. Sadler confirmed that, at a meeting on January II, 1996, SFA had insisted upon a guarantee that all HB-supplied merchandise would be properly labeled. Ms. Sadler then went on to confirm that SFA also advised HB at the January 11 meeting that "Saks does not wish to sell jackets containing recycled cashmere." Id. The inference Plaintiffs would draw from this letter is that the only reason SFA did in fact sell such jackets was that it was fraudulently induced to do so by HB's failure to label the jackets as containing recycled cashmere.

There are at least two problems with Plaintiffs' reliance on this letter as proof that customers would not have purchased the HB blazers had they known that the blazers contained recycled cashmere. First, a single customer does not constitute a significant portion of the consuming public, at least not without proof that such single customer accounts for a disproportionately large volume of purchases. See supra note 2.

Perhaps more importantly, any inference of deception and reliance that Plaintiffs would draw from this letter is nullified by the fact that SFA, with full knowledge that HB's Fall 1996 blazers contained recycled cashmere, did purchase and stock such a line, properly labeled with regard to recycled cashmere. Schutzbank Aff. at ¶ 8.[9] This

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[9] In this respect, SFA's purchasing behavior was apparently consistent with that of HB's other customers. In 1996, *after* HB began labeling its cashmere blend blazers as containing recycled cashmere, and in the face of increasing competition, see

purchasing behavior is consistent with the explanation Ms. Sadler gave at her deposition as to the reason SFA expressed misgivings at the January 11 meeting about selling jackets containing recycled cashmere. As Ms. Sadler testified, SFA was not at that time familiar with recycled cashmere, it had never before considered the question whether it wished to sell garments containing such fabric, and it did not know at the time what the process was by which recycled cashmere was created. Deposition of Carol P. Sadler, attached as Ex. 7 to Summersgill Decl., 110. Thus, the statement that SFA did not wish to sell jackets containing recycled cashmere "was a strategic and purposeful statement in order to give Saks room if it came out that there was recycled cashmere in the jackets and we chose not to accept the goods on order." Id. In other words, SFA's statement "was ... something that could ripen into a negotiation or a renegotiation." Id. Given SFA's subsequent decision to stock recycled cashmere jackets, and in the absence of any contrary evidence in the summary judgment record, it must be assumed that Ms. Sadler's testimony was truthful. See Abbott v. Bragdon, 107 F.3d at 942 (opposing party may not "derail summary judgment by the primitive expedient of insisting that his opponent's evidence should be disbelieved")

Schutzbank Aff. at ¶ 2, HB's sales of cashmere blend blazers *increased* from $11.5 million to $11.6 million. See Appendix A attached to Pls' Opp.. These sales figures belie Plaintiffs' unsupported assumption that customers were fraudulently induced to purchase HB's pre-1996 lines of blazers by the implication that they contained virgin cashmere.

(citing Grubb v. KMS Patriots, L.P., 88 F.3d 1, 4 (1st Cir. 1996)).

Aside from their reliance on the SFA letter, Plaintiffs cite in their opposition papers other evidence that purportedly shows that HB's mislabeling affected the purchasing decisions of a significant portion of retailers and consumers. First, they cite the January 1995 letter in which HB was informed by its testing laboratory that a fabric sample contained recycled cashmere. Pls' Mem. at 12, Plaintiffs do not attempt to explain how this letter tends to show that HB's customers were deceived by and relied upon HB's false labeling, and I fail to see any conceivable connection.

Plaintiffs also cite figures that show that, at the same time that LWP's overall profitability was declining, HB's sales and profits from cashmere blend garments were on the rise. In the first place, this is a comparison of apples and oranges, because LWP's overall profitability is based upon its success in selling a full line of fabric products, not simply blended cashmere, let alone blended cashmere blazers. Without evidence as to the breakdown of LWP's sales and profitability by line of fabric, there is no basis for concluding that LWP's overall sales and profitability were materially adversely affected by poor sales of low blend cashmere. In the second place, the fact that HB's blazer profits were increasing at a time that LWP's fabric profits were declining tells us nothing about the cause of LWP's problems or of HB's success or about whether there is any link whatsoever between profitability and mislabeling. To take one obvious example, HB's success might

well have been attributable to the popularity of its name or the attractive styling of its blazers. Plaintiffs' Rule 30(b)(6) deponents admitted ignorance as to this possibility. See Glidden Dep. at 158-162; McEwen Dep. at 88-89. Without evidence, it is entirely speculative to assume a causal connection between mislabeling and the parties' operating results.

Finally, in a footnote, Plaintiffs claim that the materiality of Defendants' mislabeling is proven by Plaintiffs' expert opinion that HB's falsely labeled blazers enjoyed an unfair price advantage over blazers that in fact contained 10 percent virgin cashmere. Pls' Opp. at 14 n.7. This is yet another non sequitur. Assuming HB's blazers were in fact mislabeled in one or both of the respects alleged by Plaintiffs, they would, if accurately labeled as containing less than 10 percent recycled cashmere, still enjoy the same price advantage over genuine 70/20/10 blazers made with virgin cashmere supplied by LWP. This would leave us with the same question with which we began this inquiry: would truthful labeling by HB have deterred a significant portion of the buying public from purchasing HB blazers, or would most customers, knowing that the blazers contained less than 10 percent recycled cashmere, still have purchased them based upon their relatively low price, their attractive styling, the HB name, or some other unrelated marketing factor? It is that issue on which Plaintiffs, to defeat summary judgment, were required to supply evidence, but, with the de minimis exception of the Sadler letter, they have utterly failed to do so. In

the absence of such evidence, Defendants are entitled to summary judgment with respect to LWP's damages claim.

3. Summary of Plaintiffs' Proof of Materiality

To summarize, Defendants concede for purposes of the present motion that they overstated the cashmere content of the HB blazers. Since the labels were literally false in this respect, Plaintiffs may rely upon the presumption of materiality to withstand summary judgment on their claim for injunctive relief. Because Plaintiffs' evidence is insufficient to establish that Defendants wilfully perpetrated an egregious scheme to defraud the public with respect to cashmere content or the use of recycled cashmere, however, Plaintiffs may not rely upon the presumption of materiality to prove LWP's claim for damages. As to that claim, Plaintiffs must present evidence that a significant number of customers were actually deceived by Defendants' mislabeling and were induced by it to make purchases they would not otherwise have made. Since Plaintiffs have failed to offer such evidence as to either of their mislabeling claims, Defendants are entitled to summary judgment with respect to LWP's damages claim.

B. Causation

Even if Plaintiffs' evidence concerning materiality were sufficient to defeat Defendants' motion for summary judgment with respect to LWP's damages claim, that claim would founder because of Plaintiffs' failure to offer evidence that the alleged mislabeling caused LWP to suffer a loss of sales.

Plaintiffs present two types of evidence in their attempt to prove such a sales loss: (1) anecdotal statements by prospective customers explaining why they did not purchase greater quantities of LWP's 70/20/10 fabric and (2) a comparison of HB's and LWP's operating results. I will consider each type of evidence in turn.

First, Plaintiffs rely on purported statements by three garment manufacturers to the effect that they declined to purchase genuine 70/20/10 fabric from LWT for use in manufacturing blazers because the relatively high price they would have to pay for such fabric would preclude them from converting it into blazers that could sell at prices competitive with HB's. From this, Plaintiffs leap to the conclusion that it was HB's mislabeling that enabled it to obtain what Plaintiffs describe as an "unfair price advantage," which price advantage in turn depressed demand for LWP's fabric.

Plaintiffs' argument is severely flawed on its merits. Before I deal with its substantive flaws, however, I must address two procedural arguments Defendants make that I find unpersuasive.

First, Defendants contend that the court should not even consider Plaintiffs' "unfair price advantage" argument because it is based on facts supplied in deposition by Plaintiffs' expert witness, Peter Warshaw, rather than by the two witnesses Plaintiffs designated to testify on its behalf pursuant to FED. R. CIV. P. 30(b)(6). By way of background, Mr. Warshaw is President of Warshaw Woolens Associates, Inc., a company that acts as an independent sales representative for LWP. He is also serving as one of Plaintiffs' expert witnesses in this case. When he was deposed in his capacity as an expert witness, Defendants asked him if he could identify any prospective customers who expressly declined to purchase fabric from LWP on account of HB's mislabeling. In response, he identified representatives of three garment manufacturers who allegedly told him that they would not purchase LWP's 70/20/10 fabric because its relatively high price precluded them from manufacturing competitively-priced blazers from it. Defendants had previously deposed two other witnesses designated by Plaintiffs pursuant to Rule 30(b)(6) Messrs. Glidden and McEwen – on the same subject of causation. Although Mr. Glidden testified about the reluctance of one such customer to purchase LWP fabric because of its relatively high price, he was apparently not familiar with the other two incidents about which Mr. Warshaw testified. At least, he did not testify about them. Similarly, Mr. McEwen was apparently unfamiliar with any of the three incidents, since he did not mention any of them in his testimony. Against this back-

ground, Defendants contend that it would somehow undermine the purpose of Rule 30(b)(6) to permit a party opposing summary judgment to rely upon evidence supplied by a non-30(b)(6) deponent such as Mr. Warshaw. I disagree. Mr. Warshaw was an independent sales representative. No matter how well Plaintiffs prepared their designated Rule 30(b)(6) witnesses to testify, there is no reason Plaintiffs or such witnesses should have been expected to be familiar with the incidents about which Mr. Warshaw testified. After all, such evidence concerned conversations between Mr. Warshaw and prospective customers that took place outside the presence of Plaintiffs and their Rule 30(b)(6) witnesses. Moreover, the information itself was elicited by Defendants themselves during the course of Mr. Warshaw's deposition. For all the record reveals, this might have been the first occasion on which Plaintiffs knew anything about these incidents. It therefore cannot be said that there was any sandbagging by Plaintiffs or any withholding by them or their designees of evidence that should have been disclosed during the Rule 30(b)(6) depositions. Nor was there any prejudice to Defendants resulting from a late disclosure of evidence. Defendants learned about the alleged incidents months before Plaintiffs relied upon them in their opposition to Defendants' motion for summary judgment. During that interim period, Defendants could have sought leave to depose the three customers who purportedly declined to purchase LWP's fabric because of its relatively high price. They chose not

to do so. Defendants certainly cannot claim unfair surprise under these circumstances.

Defendants' second procedural argument is that the statements purportedly given by prospective customers to Mr. Warshaw, in which these customers attributed their reluctance, to purchase LWP fabric to HB's relative price advantage, are inadmissible hearsay. See FED. R. CIV. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence,* and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") (emphasis supplied). Again, Defendants are mistaken. The rules of evidence in this court specifically make admissible a "statement of the declarant's then existing state of mind ... (such as intent [and] motive)." FED. R. EVID. 803(3). This exception easily encompasses the reasons given by buyers (the declarants in this case) to Mr. Warshaw for their reluctance to purchase 70/20/10 fabric manufactured by LWP. Thus, the statements, although hearsay, are "admissible in evidence."

This brings us then to the underlying substantive flaws in Plaintiffs' argument that the statements about HB's pricing advantage by prospective LWP customers constitute proof that LWP lost sales as the result of Defendants' mislabeling. The primary flaw is that the statements tend to prove, at most, that it was HB's low prices, not its mislabeling, that injured LWP. The two are not synonymous. The distinction between low prices and mislabeling can perhaps best be

illustrated by considering what the situation would have been had HB continued to sell the same blazers, accurately labeled as containing recycled cashmere in some quantity less than 10 percent. Under those circumstances, the prices of the accurately-labeled blazers would have been the same as, or less than, the prices of the falsely-labeled blazers.[10] Similarly, accurate labeling by HB would not have caused the price of LWP fabric, and, therefore, of blazers made from such fabric, to decrease. Therefore, if the HB blazers had been accurately labeled as containing recycled cashmere in an amount less than 10 percent, they would have enjoyed at least the same relative price advantage over blazers made from LWP fabric. There is thus no reason to believe that, but for the mislabeling, prospective LWP customers would have been any more inclined to purchase LWP fabric then they in fact were.

Plaintiffs make at least two responses. First, as set forth in Mr. McEwen's expert report, Rule 26 Expert Report and Direct Testimony of James D. McEwen, CPA, Docket No. 298, Plaintiffs contend, with absolutely no evidentiary support, that, had HB accurately labeled its blazers as containing less than 10 percent recycled cashmere, then (1) HB would in fact have sold no blazers whatsoever and (2) all fabric manufactur-

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[10] The reason the prices of HB's blazers might have been lower had they been accurately labeled is that customers might have resisted paying the original price for blazers that contained recycled cashmere in a quantity below 10 percent. This would have increased, not decreased, the price advantage of HB blazers, relative to the price of blazers manufactured from LWP's 70/20/10 fabric.

ers, including LWP, would have sold to blazer manufacturers, in the aggregate, an incremental quantity of low blend cashmere fabric equal to the quantity of mislabeled fabric that would have gone into the mislabeled HB blazers, with the incremental sales of each fabric manufacturer being in proportion to such manufacturer's share of the overall market for low blend cashmere. Not only is this assumption made up out of whole cloth, but it is inconsistent with uncontradicted evidence in the summary judgment record. It is undisputed, for example, that when HB began accurately labeling its blazers as containing recycled cashmere, its sales not only did not fall, but they increased. See supra note 9. Plaintiffs offer no evidence that suggests that customers are any more concerned about cashmere content then they are about whether the cashmere is recycled. Moreover, Plaintiffs' own expert, Mr. Warshaw, contends that price is the single most important factor in a garment manufacturer's decision to purchase a particular mill's fabric. Rule 26 Expert Report and Direct Testimony of Peter B. Warshaw, Docket No. 299, ¶ 6. This concession, combined with the admitted ignorance of Plaintiffs' 30(b)(6) designees concerning the extent to which customers were in fact also influenced in their purchasing decisions by the popularity of the HB name or the attractiveness of its styling, completely undercuts any claim that HB would have had no sales whatsoever if it sold low-priced blazers that had been accurately labeled as containing recycled cashmere in a quantity below 10 percent. Finally, even if it were true – regardless of

the low price and attractive styling of the HB blazer and the popularity of the HB name – that no customers would have been willing to purchase low-priced HB blazers if they had been accurately labeled as containing recycled cashmere in a quantity below 10 percent, no evidence in the summary judgment record suggests that those disaffected former HB customers would have been any more willing then they actually were to pay relatively higher prices for blazers made from genuine 70/20/10 fabric supplied by LWP. See supra page 6 (discussing hypothetical customer's willingness to purchase diamonds in lieu of properly labeled cubic zirconium). For all these reasons, it is not only speculative but wildly implausible for Plaintiffs to contend that, but for mislabeling, HB would have had no sales whatsoever, and that all the sales that HB in fact made would have been redistributed to sellers of blazers manufactured with genuine 70/20/10 fabric.

Perhaps recognizing the implausibility of and complete lack of record support for the foregoing argument, Plaintiffs seemed to propose a fallback position at oral argument. There, they suggested that LWP's sales would have been greater if HB, instead of conforming the label it was using to the actual cashmere content of the blazers it was selling, conformed the cashmere content of the blazers it was selling to the label it was using. In other words, they argued that, if HB were in fact selling blazers made from genuine 70/20/10 fabric, it would have to raise its selling price, thus opening the door to competition from blazers

made from LWP fabric. Again, there are several problems with Plaintiffs' argument.

First, there is a fatal legal flaw in Plaintiffs' argument. The gravamen of a complaint under section 43(a) of the Lanham Act is that a defendant used false advertising artificially to boost sales of its product. To satisfy the third element of a Lanham Act violation, it is therefore incumbent on LWP to prove that Defendants' false advertising with respect to the blazers they were actually selling caused LWP to loose sales. The blazers that Defendants were actually selling contained recycled cashmere in a quantity which we must assume was below 10 percent, and they sold for a price that was low relative to the price of blazers made from LWP's 70/20/10 fabric. LVYRP cannot satisfy the causation element by hypothesizing about what would have happened to its sales if Defendants had instead been selling *different* blazers with which LWP perhaps would have been better able to compete – blazers that contained a full 10 percent virgin cashmere and sold for prices comparable to the prices of blazers made from LWP fabric. Defendants have an absolute legal right to sell less expensive, arguably inferior blazers, and it is those blazers, properly labeled, with which LWP must compete. If Plaintiffs do not offer evidence that LWP's sales would have been greater if Defendants had been selling *those* blazers, properly labeled (and they have not done so), then they have failed to satisfy the causation element of a claim for false advertising under the Lanham Act. Stated another way, it is legally irrelevant to the present inquiry that it would be

easier for LWP to compete with HB if HB abandoned the successful market niche it carved out for itself and began selling, instead, blazers of a higher price and quality. The relevant question is what would have happened to LWP's sales if HB sold the same low-priced line of products that it chose to sell, *properly labeled.* The summary judgment record is devoid of evidence that supports LWP's contention that its sales would have been better under these circumstances.

The second problem with Plaintiffs' alternative argument is that it is fatally inconsistent with LWP's theory of damages. It will be recalled that, as LWP would have it, HB's sales of low blend cashmere blazers would fall to zero, and all other sellers of genuine 70/20/10 fabric, in the aggregate, would enjoy higher sales in an amount equal to the quantity of fabric that would have gone into the HB blazers. As previously noted, this theory entirely lacks support in the summary judgment record and is so implausible that it is hard even to conceive of a set of circumstances under which this would happen. If there were any such circumstances, however, it would be that customers were simply too status conscious to be willing to purchase inexpensive blazers containing a low quantity of recycled cashmere. But these circumstances would not pertain if HB upgraded the quality of its blazers to include a full 10 percent virgin cashmere and sold those blazers at prices that were competitive with the prices of blazers made from LWP fabric. Under those circumstances, it is not just difficult, but impossible, to conceive of any circumstances under

which HB's sales would fall to zero. Nor is there any evidence that this would happen. Plaintiffs' alternative theory of liability, under which HB would upgrade the quality of its blazers to match the content of the label, is therefore hopelessly at odds with its theory of damages.

The third flaw in Plaintiffs' alternative theory of liability is factual. In the first place, undisputed evidence in the summary judgment records establishes that HB would not have to raise the price of its blazers significantly even if it were to pay the higher prices commanded by LWP for its 70/20/10 fabric. Schutzbank Aff. at ¶ 3. Second, in the absence of evidence regarding the extent to which customers purchased HB blazers because of the attractiveness of their styling or the cachet of the HB name, it is speculative to assume that more people would buy blazers containing LWP fabric if HB upgraded the quality and raised the price of its blazers. Similarly, in the absence of evidence regarding the extent to which prospective blazer purchasers are sensitive to price, it is speculative to assume that they would be willing to pay a higher amount to purchase either upgraded HB blazers or blazers made from LWP's higher price d fabric. The bottom line is that, in the absence of evidence, we can only speculate about how customers would react if HB upgraded its blazers to make them conform with the existing label, rather than downgrading the label to make it conform with existing product. Therefore, even if this were the legally relevant inquiry (and it is not), the evidence in the summary judgment

record does not establish that LWP's sales were adversely affected by Defendants' mislabeling.

Summarizing to this point, evidence that three garment manufacturers doubted that blazers manufactured from LWP fabric could compete with HB's blazers on the basis of price does not tend to show that, but for the mislabeling, LWP would have enjoyed higher sales. With accurate labeling, the *same* price disparity would have existed, and it is anyone's guess whether customers, knowing that the HB blazers contained recycled cashmere in an amount less then 10 percent, would have preferred to pay higher prices for blazers made from genuine 70/20/10 fabric supplied by LWP. Further, Plaintiffs' alternative argument that LWP would have sold more fabric. If HB were selling better blazers at higher prices is legally irrelevant and devoid of factual support. Finally, there is no basis in logic or in the evidence to believe that HB's sales would have fallen to zero, as Plaintiffs' damage theory assumes, if HB were selling blazers that were equivalent in quality and price to blazers made from LWP fabric. For all these reasons, even if HB enjoyed an unfair price advantage, it would not follow that HB's mislabeling adversely affected LWP's sales.

The second type of evidence that Plaintiffs offer to establish that LWP's sales were adversely affected by HB's mistabeling consists of comparative operating results. The significance of this evidence was already addressed in the context of the discussion regarding materiality. See supra page 25. For all the reasons previously given, the fact that HB's profits from low cashmere blend

blazers were rising at a time when LWP's profits from overall fabric sales were falling does not tend to show that, but for HB's mislabeling, LWP would have enjoyed greater sales of low blend cashmere fabric.

Because Plaintiffs have failed to offer evidence sufficient to prove causation, I recommend that Defendants' motion for summary judgment be granted as to LWP's Lanham Act damages claim.

VI. Analysis of Chapter 93A and Unfair Competition Claims

Little needs to be added to the foregoing analysis of Plaintiffs' Lanham Act claim to dispose of LWP's claim for damages under chapter 93A or the common law of unfair competition. Both sides agree, correctly, that the elements of a 93A claim are at least as inclusive as the elements of a claim under the Lanham Act. HB Mem. at 15; Pls' Opp. at 20. Further, both sides agree, again properly so, that one element of a common law claim for unfair competition is that the defendant's acts caused injury to the plaintiffs business. HB Mem. at 16; Pls' Opp. at 21. In light of the foregoing discussion, therefore, it is apparent that LWP's damage claims under chapter 93A and the common law of unfair competition must fail in the absence of proof that Defendants' mislabeling caused LWP to suffer any loss of business.

VII. CCMI's Claim for Injunctive Relief

The premise of Defendants' motion for summary judgment as to CCMI's claim for injunctive relief is that (1) the claim is moot, in that it seeks to enjoin sales of HB's pre-1998 lines of products, all of which have already been sold out, and (2) because of new testing techniques that Defendants have implemented, the claim is not one that is capable of repetition yet evading review. HB Mem. at 17-19. The problem with this argument is that the premise that Plaintiffs' evidence of mislabeling is restricted to the pre-1998 line of garments may be incorrect. If, indeed, Plaintiffs have and intend to present evidence of continued mislabeling fight through the present, then their claim is not moot, and there is no need to reach the question of whether Defendants' past misdeeds are, in the abstract, capable of repetition yet evading review. Unfortunately, the record is hopelessly confused on this point, and, for that reason, it would be premature to award Defendants summary judgment on Plaintiffs' claim for injunctive relief. To explain, I shall first review the bidding.

Defendants filed their motion for summary judgment (Docket No. 328), accompanied by a memorandum (Docket No. 330), and a Statement of Undisputed Material Facts ("SUMF") pursuant to Local Rule 56.1 (Docket No. 329) on July 22, 1998. Defendants' SUMF does not directly address the question of whether there is evidence that Defendants continued to overstate the cash-

mere contents of their blazer line after 1997.[11] The closest the SUMF comes to addressing this point is to say, in paragraph 6, that "All low cashmere blend garments included in. Harve Benard's 1997 and prior years' lines have either been sold or removed from sale." This of course tells us nothing about whether HB is continuing to overstate the cashmere content of blazers sold after 1997.

HB might argue that it is incumbent on Plaintiffs to make it an issue, if they believe they haveevidenceofpost-1997mislabeling. For two reasons, disagree. First, the burden of obtaining summary judgment is on the party seeking it. Indeed, the very purpose of Local Rule 56.1 is to require the moving party to lay out the undisputed facts upon which it believes it is entitled to summary judgment. Therefore, if Defendants contend that Plaintiffs have no evidence that post-1997 lines of blazers are continuing to test as having less than 10 percent cashmere (recycled or otherwise), they should have said so in their SUMF.

Second, Defendants have in fact conceded in their summary judgment memorandum that the evidence in the record is sufficient to support a finding that Defendants are overstating the cashmere content of all blazers, not just those

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[11] I shall assume for purposes of this discussion that Defendants did begin labeling their blazers as containing "recycled cashmere" beginning in the spring of 1996 and that they have continued to do so through the present time. Therefore, to the extent there is any question about the continued accuracy of Defendants' labeling, the concern is with the accuracy of the stated percentage of cashmere content of the garments in question.

manufactured and sold through 1997. HB Mem. at 1 n.1. Defendants might contend that it was their intention in making such a concession to cut it off with respect to the 1997 line of blazers, but the concession, by its terms, is not so limited, It states in pertinent part: "Although Harve Benard will assume, solely for the purposes of this motion, that the plaintiffs could prove that Harve Benard has in fact mislabelled the cashmere content of its garments, Harve Benard vigorously disputes this accusation." Id. There is no time limitation in this concession. Therefore, it would not be surprising that Plaintiffs would fail to present evidence of a continuing mislabeling violation, even if such evidence existed.

I therefore cannot accept the premise of Defendants' mootness argument to the effect that it would be inappropriate to enjoin future misconduct on the basis of evidence solely of past wrongdoing that terminated in 1997. For all the summary judgment record reveals, the wrongdoing might be continuing. If it is, then Plaintiffs would be entitled to an injunction, without having to prove to the court's satisfaction that Defendants' past wrongdoing was capable of repetition yet evading review.

Of course, it might well be the case that Plaintiffs have no evidence of mislabeling after 1997. If that is correct, then Defendants might well be entitled to judgment as a matter of law based on their mootness argument. That issue can and should be addressed, however, only after the record has been clarified as to whether such evidence of present mislabeling exists or not. For

the foregoing reason, I recommend that Defendants' motion for summary judgment as to injunctive relief be denied *without prejudice,* pending clarification of this critical issue.

VIII. Conclusion

For the reasons stated above, I recommend that Defendants' motion for summary judgment be **ALLOWED** as to LWP's damages claims under the Lanham Act, chapter 93A and the common law of unfair competition, and **DENIED**, without prejudice, as to CCMI's claim for injunctive relief

IX. IMPORTANT NOTICE OF RIGHT TO OBJECT AND WAIVER OF RIGHT TO APPEAL FOR FAILURE TO DO SO WITHIN TEN DAYS

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court **WITHIN 10 DAYS** of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall

preclude further appellate review by the Court of Appeals of the District Court's order entered pursuant to this Report and Recommendation. See United States v. Valencia-Copete, 792 F.2d 4, 5-6 (1st Cir. 1986); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 379 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 19.80); see also Thomas v. Arn, 474 U.S. 140, 148-149 (1985), reh'g denied, 474 U.S. 1111 (1986).

/s/_____
ZACHARY R. KAROL
UNITED STATES MAGISTRATE JUDGE

Notice to: Attorneys Kaler, Lee, Crossen, Lynn, et al.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, f/k/a CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC., and L.W. PACKARD & CO., Plaintiffs,	)	**DOCKETED**
v.	)	Civil Action No. 96-10127-RCL
SAKS FIFTH AVENUE, FILENE'S BASEMENT, and HARVE BENARD, LTD., Defendants.	)	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

LINDSAY, D.J.

The following motions are before the court:

1. Motion by Harve Benard for summary judgment (Docket No. 328),

2. Motion by Saks Fifth Avenue for summar judgment (Docket No. 327),

3. Motion by Filene's Basement for summar judgment (Docket No. 333),

4. Renewed motion by Harve Benard for summary judgment with respect to CCMI (Docket No. 381),

5. Renewed Motion by Saks Fifth Avenue for summary judgment (Docket No. 385), and

6. Renewed Motion by Filene's Basement for summary judgment (Docket No. 388).

The court has received a report and recommendation from Magistrate Judge Karol regarding the motions for summary judgment by Harve Benard (Docket No. 328), Saks Fifth Avenue (Docket No. 327), and Filene's Basement (Docket No. 333). Upon consideration of the papers filed in support and in opposition to the report in recommendation, the court accepts and adopts the report and recommendation. Therefore, the motions for summary judgment by Harve Benard, Saks Fifth Avenue, and Filene's Basement are GRANTED.

The court further rules that the renewed motions for summary judgment by Harve Benard (Docket No. 381), Saks Fifth Avenue (Docket No. 385), and Filene's Basement (Docket No. 388) are DENIED. The plaintiff CCMI has established that a disputed issue of material fact exists with regard to whether Harve Benard has continued to mislabel its women's blazers as containing ten percent cashmere. The parties have one month

from the date of this order to complete discovery on this issue. The court shortly will issue an order for the final pre-trial conference.

/s/_____
United States District Judge

Dated: 3/22/00

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2341

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, f/k/a CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC.;
L. W. PACKARD & CO.,
Plaintiffs-Appellants.
V.
SAKS FIFTH AVENUE, HARVE BENARD, LTD. AND FILENE'S BASEMENT,
Defendants-Appellees.

BEFORE

BOUDIN, Chief Judge,
ROSENN,* Senior Circuit Judge,
TORRUELLA, SELYA, Circuit Judges,
STAHL, Senior Circuit Judge,
LYNCH,** and LIPEZ, Circuit Judges.

ORDER OF COURT

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* Of the Third Circuit, sitting by designation

** Judge Lynch is recused from this matter.

Entered: May 22, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:

RICHARD CUSHING DONOVAN, Clerk

JANICE M. O'NEIL

By:_____
Chief Deputy Clerk

[cc: Messrs. Kaler and Bassett]

APPENDIX E

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RICHARD CUSHING DONOVAN
CLERK

UNITED STATES COURT HOUSE
1 COURTHOUSE WAY, SUITE 2500
BOSTON, MA 02210
(617) 748-9057

May 22, 2002

No. 00-2341, Cashmere & Camel Hair Manufacturers Institute, f/k/a Camel Hair & Cashmere Institute of America, Inc. v. Saks Fifth Avenue, Harve Benard, Ltd., and Filenes Basement

Dear Sir/Madam:

Please be advised that the opinion of the court released On April 1, 2002 has been modified and, or, corrected in the manner set forth in the attached "Errata". The modifications and, or, corrections should be included in all published or distributed copies of this opinion.

Richard Cushing Donovan, Clerk.

cc: Counsel of Record
Bureau of National Affairs

Commerce Clearing House
National Center for Automated
Information Retrieval
Massachusetts Lawyers Weekly
Source Acquisition
West Publishing Company

cc: Case file.

United States Court of Appeals
For the First Circuit

No. 00-2341

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, F/K/A CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC., AND L.W. PACKARD & CO., INC.,
Plaintiffs, Appellants,
v.
SAKS FIFTH AVENUE, HARVE BENARD, LTD. AND FILENES BASEMENT,
Defendants, Appellees.

ERRATA SHEET

The opinion of this Court issued on April 1, 2002, is amended as follows:

On page 28, line 2: Insert a one-sentence paragraph that reads:

> "Nothing in this opinion, however, is meant to preclude defendants from rebutting the presumption of consumer deception at trial by showing that the labeling did not actually deceive consumers."

APPENDIX F

MANDATE

United States Court of Appeals
For the First Circuit

No. 00-2341

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, f/k/a CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC.; L.W. PACKARD & CO., INC.,
Plaintiffs, Appellants,

v.

SAKS FIFTH AVENUE, HARVE BENARD, LTD. AND FILENES BASEMENT,
Defendants, Appellees.

JUDGMENT

Entered: April 1, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows:

The judgment of the district court is reversed and the matter remanded to the district court for further proceedings consistent with the opinion issued this day.

By The Court:
Richard Cushing Donovan,
Clerk

By: /s/
Chief Deputy Clerk

Certified and Issued
As mandate under
Fed. R. App. P. 4

MAY 31 2002

RICHARD CUSHING DONOVAN

Clerk

/s/
Deputy Clerk

[cc: Mr. Kaler and Mr. Bassett.]

APPENDIX G

UNITED
STATES
CODE ANNOTATED

TITLE 15

Commerce and Trade
§§ 1115 to 1150

Comprising All Laws of a General
and Permanent Nature
Under Arrangement of the Official Code of
the Law of the United States
with
Annotations from Federal and State Courts

WEST GROUP
ST. PAUL, MINN.

§ 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil Action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or

any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, and L.W. PACKARD & CO., Plaintiffs,	)	
v.	)	Civil Action No. 96-10127-RCL
SAKS FIFTH AVENUE, FILENE'S BASEMENT, and HARVE BENARD, LTD., Defendants.	)	

PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL OF REMAINING INJUNCTION CLAIM

Plaintiff L.W. Packard & Co.'s claim for damages, and plaintiff Cashmere and Camel Hair Manufacturers' Institute's ("CCMI's") claim for injunctive relief as to the defendants' mislabeling of cashmere-blend garments as to their "recycle" content, both having been dismissed as a result of the adoption of the Magistrate's July 1, 1999 Report and Recommendation, and defendants' recently-produced documents having indicated that they have tested the cashmere fabric to be used in their upcoming line of garments using a CCMI-approved laboratory, CCMI hereby moves, in ac-

cordance with the discussion before the Court at the June 8, 2000 Pretrial Conference, for leave to dismiss with prejudice its remaining claim for injunctive relief as to the percentage cashmere content of the defendants' Fall 2000 line.

In support of this motion, plaintiff CCMI states that although it disagrees with the dismissal of the above-referenced claims (as a result of the adoption of the Magistrate's Report), and expects to appeal those dismissals, the only remaining claim as to which CCMI would otherwise be entitled to a trial at this time is its claim for an injunction against the defendants overstating the cashmere content of their upcoming Fall 2000 line. In light of the evidence that the fabric in those garments has been tested by a CCMI-approved laboratory, CCMI has determined that the most appropriate course is to dismiss that particular claim with prejudice to avoid an unnecessary trial on that issue, without prejudice to the plaintiffs' right to appeal the broader rulings dismissing the bulk of their claims.

WHEREFORE, plaintiff Cashmere and Camel Hair Manufacturers' Institute prays that this motion be allowed.

Respectfully submitted,

CASHMERE and CAMEL HAIR MANUFACTURERS INSTITUTE,
By its attorneys,

/s/
Robert J. Kaler, BBO #542040
Gasdby Hannah LLP
225 Franklin Street
Boston, MA 02110
(617) 345-7000

CERTIFICATE OF SERVICE
I hereby certify that on this day a true copy of the Above document was served upon the attorney of Record for each party by mail/hand.

Date: 7/5/00 /s/

Local Rule 7.1 Certification

I, Robert J. Kaler, hereby certify that I have conferred in good faith with opposing counsel in an effort to resolve or narrow the issues raised in this motion, but have been unable to do so.

/s/
Robert J. Kaler

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, ET AL
Plaintiff(s)

DOCKETED

v. CIVIL ACTION NO. 96-10127-RCL

SAKS FIFTH AVENUE, ET AL
Defendant(s)

JUDGMENT IN A CIVIL CASE

LINDSAY, D.J.

☐ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by the Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered. In accordance with the Court's approval of the Report and Recommendation on the defendants' motions for summary judgment on March 23, 2000 and the plaintiffs' motion for voluntary dismissal of injunction claim allowed by the Court on July 24, 2000;

IT IS ORDERED AND ADJUDGED

Judgment for the defendants, Saks Fifth Avenue, Filene's Basement and Harve Benard, Ltd.

TONY ANASTAS, CLERK

/s/
(By) Deputy Clerk

Dated: July 27, 2000

NOTE: The post judgment interest rate effective this date is _____%.

APPENDIX J

Revised errata sheet.

[1]Volume I
Pages 1 to 209
Exhibits 1 to 21

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE f/k/a CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC., and L.W. PACKARD & CO., Plaintiffs,	:	
vs.	:	Civil Action 96cv10127-RCL
SAKS FIFTH AVENUE, FILENE'S BASEMENT, HARVE BENARD LTD., THE MAY COMPANIES, and WEINTRAUB & SONS, INC., Defendants.	:	

DEPOSITION OF L.W. PACKARD & CO., by its designee JAMES D. McEWEN, called on behalf of the Defendant Harve Benard Ltd., taken pursuant to the Federal Rules of Civil Procedure, be-

fore Susan M. Manty, Certified Shorthand Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the Offices of Hale and Dorr, LLP, 60 State Street, Boston, Massachusetts, on Thursday, April 2, 1998, commencing at 9:10 a.m.

PRESENT:

Gadsby & Hannah, LLP
(by Edward W. Little, Jr., Esq.)
225 Franklin Street,
Boston, MA 02110-2811,
for the Plaintiffs.

(Continued on next page)

[55] content, is there anything that you can think of besides that document?

A. No.

MR. SUMMERSGILL: Why don't we go and take the break, because I don't know where those guys are.

(Recess taken)

BY MR. SUMMERSGILL:

Q. Mr. McEwen, is it Packard's contention that consumers have been deceived by Harve Benard's alleged mislabeling.

A. Yes.

Q. What is the basis for that contention?

A. That Harve Benard knowingly used recycled cashmere, bought recycled cashmere cloth, and labeled it as cashmere.

Q. But what is the basis that that activity you've just described has deceived any consumers?

A. I just said it, that they lied to them.

Q. What evidence does – what specific evidence does Packard have showing that Harve Benard's alleged mislabeling has affected consumer decisions?

A. None that I know of.

[88] and recycled cashmere together?

Q. I'm just asking you what evidence you have indicating that Harve Benard knew its labels were falsely labeled as to the percent of cashmere in the garments, and I believe you've told me that Packard does not have any such evidence; is that correct?

MR. LITTLE: Objection.

A. Yes.

Q. Turning your attention to Harve Benard's pre-1996 line, what evidence does Packard have indicating that any customer would not have purchased the jacket if it had been labeled as containing less than 10 percent cashmere?

A. It has no evidence.

Q. What percent of Harve Benard's customers bought the low cashmere jackets primarily, again pre-1996 line, primarily because of Harve Benard name or other than because of any fabric content?

A. I don't know.

Q. What percent bought because of the attractive styling?

A. I don't know.

Q. Turning to the 1996 and the liens thereafter, what evidence does Packard have **[89]** indicating that any customer would not have purchased the jacket or the jackets if they had been labeled as containing less than 10 percent cashmere?

A. We don't have any evidence.

Q. What evidence does Packard have indicating that any customer would not have purchased the jackets if they had been labeled as containing even zero percent cashmere?

A. We don't have any evidence.

Q. What percent of customers bought the 1996 and 1997 lines because of the Harve Benard name?

A. I don't know.

Q. What percent bought the Harve Benard 1996 and 1997 lines because of Harve Benard's attractive styling?

A. I don't know.

Q. Mr. McEwen, at present, what is Packard's total manufacturing capacity?

A. It would vary, but approximately 800 to 1,000 pieces per week.

Q. How many yards are in a piece?

A. It would average somewhere between, probably average around 75 to 80 yards, but could range from high 50s to slightly over 100.

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, f/k/a CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC. and L.W. PACKARD & CO., Plaintiffs,	)	
v.	)	Civil Action No. 96-10127-RCL
SAKS FIFTH AVENUE, FILENE'S BASEMENT, HARVE BENARD, LTD., Defendants.	)	

AFFIDAVIT OF KARL SPILHAUS IN OPPOSITION TO HARVE BENARD'S RENEWED MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO CCMI

I, Karl Spilhaus, being duly sworn, do hereby testify as follows:

1. I am the President of the Cashmere & Camel Hair Manufacturers Institute, formerly known as the Camel Hair & Cashmere Institute of

America (the "Cashmere Institute"). I have been the chief executive officer of the Cashmere Institute, first as its Executive Director and now as its President, since April of 1984. I am 53 years old, and am competent to testify.

2. The Institute is a non-profit trade association of manufacturers and marketers of luxury cashmere fibers, and cashmere and cashmere blend yarns, fabrics and garments. Its members include major manufacturers of cashmere and cashmere blend fiber and fabric in the United States, Italy, England, Scotland, Switzerland, and

. . . . .

garments. I have personally observed the process of used garments being recycled both in Italy and in the United States. The process of recycling, as I have observed it, involves the use of machinery to tear apart existing garments, during or after which they are subjected to a wet processing with the resulting wool fibers dried out, frequently carbonized (subjected to heat and sulphuric acid), and then re-used in the manufacture of other fabric.

38. In the process of tearing apart existing garments, considerable damage is inevitably done to the fibers in those garments, and additional damage is also done by the acid or other chemical treatments applied to them during the recycling process. The result is that recycled fibers frequently have substantial surface damage to their scale structure which effects their ability to felt, or bind together, thereby effecting the abil-

ity of a recycled fiber fabric to hold together as well or as long as fibers which are being used in the fabric for the first time. Such fabric will be rougher to the touch and lack "handle," plushness or softness normally associated with quality woolen or cashmere products.

39. In my professional opinion, a manufacturer, importer, or retailer can gain an enormous competitive advantage by illegally marketing garments as "wool" or "cashmere", when in fact the garments are made from recycled wool or recycled cashmere, because the cost of recycled fabric is much lower than the cost of new fabric. Consumers are obviously deceived by this kind of mislabeling, however.

Sworn to under the pains and penalties of perjury this 30th day of September, 1999.

/s/_____
Karl Spilhaus

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail/hand.

Dated: 10/1/99 /s/_____

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE, f/k/a CAMEL HAIR & CASHMERE INSTITUTE OF AMERICA, INC. and L.W. PACKARD & CO., Plaintiffs,	)	
v.	)	Civil Action No. 96-10127-RCL
SAKS FIFTH AVENUE, FILENE'S BASEMENT, HARVE BENARD, LTD., THE MAY COMPANIES, and WEINTRAUB & SONS, INC. Defendants.	)	

AFFIDAVIT OF HARVEY SCHUTZBANK IN SUPPORT OF HARVE BENARD'S MOTION FOR SUMMARY JUDGMENT

I, Harvey Schutzbank, being duly sworn, state as follows:

1. I am the Vice President and Chief Financial Officer for the defendant Harve Benard, Ltd. ("Harve Benard").

2. I understand that the plaintiffs in this action have asserted that if Harve Benard had labelled its pre-1996 low cashmere blend ladies blazers as containing "recycled cashmere," rather than simply "cashmere," Harve Benard would have lost some or all of its sales of the low cashmere blend ladies blazers. I do not believe this assertion has merit. The labelling of Harve Benard's 1996 and subsequent low cashmere blend ladies blazer lines as containing "recycled cashmere" had no perceptible adverse impact upon the sales of those garments. The level of sales of the low cashmere blend ladies blazers has remained relatively stable since they were labelled as containing, "recycled cashmere" despite the fact that Harve Benard has faced increasing competition in the low cashmere blend blazer market. Upon information and belief, Harve Benard is the only manufacturer of 70/20/10 low content cashmere ladies blazers that labels its blazers as containing "recycled cashmere."

3. I also understand that the plaintiffs in this action have asserted that Harve Benard's alleged mislabelling enabled it to sell its garments at a lower price thus causing L.W. Packard & Co. ("Packard") to lose sales. In fact, when all associated costs (such as cutting, sewing, and duty) are taken into account, the price of Harve Benard's garments would not have been significantly different had Harve Benard used Packard fabric. Harve Benard chose to use the fabric imported from Italy because of Italy's proximity to Harve Benard's place of manufacturing.

4. I also understand that plaintiff Cashmere & Camel Hair Manufacturers Institute ("CCMI") is suing to enjoin the sale of Harve Benard's 1997 and prior lines of the low cashmere blend ladies blazers. Based on the information available to me, all of Harve Benard's 1997 and prior lines of the low cashmere blend ladies blazers have either been sold or removed from sale.

5. In the past, Harve Benard has purchased its low cashmere blend fabric, for use in its low cashmere blend ladies blazers, from Marcolana, a mill in Italy. Harve Benard is not obligated, contractually or otherwise, to purchase its low cashmere blend fabric for future garments from the same mill.

6. Beginning with the 1997 line, Harve Benard has subjected its low cashmere blend fabric to a more comprehensive testing program than previously used. In this new process, samples of fabric are randomly chosen by an independent party and forwarded to no less than three expert fabric analysts who test the fabric to ensure that its cashmere content conforms to the label. The garments are sold only if appropriately labelled. The testing, regime for future lines may be further refined.

7. Upon information and belief, the Bromley Corporation does not manufacture ladies blazers.

8. In 1996, Saks Fifth Avenue ("Saks") purchases Harve Benard Fall 1996 line garments which were labelled as containing recycled cashmere.

Sworn to under the pains and penalties of perjury this 22 day of July, 1998.

/s/
Harvey Schutzbank

Supreme Court, U.S.
FILED
SEP 23 2002
CLERK

(2)

No. 02-279

IN THE

Supreme Court of the United States

SAKS FIFTH AVENUE and HARVE BENARD, LTD.,

Petitioners,

v.

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE and L.W. PACKARD & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

ROBERT J. KALER
GADSBY & HANNAH, LLP
225 Franklin Street, 22nd Floor
Boston, Massachusetts 02110
(617) 345-7000

Attorneys for Respondents

176324

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

30 pp

QUESTION PRESENTED

Whether this Court should review the denial of summary judgment in a false advertising case where (i) the Court of Appeals has already determined, based on its review of the evidence, that "a reasonable factfinder could conclude that the defendants' material mislabeling of their garments deceived the consuming public, enabled defendants to lower their garment prices, and caused [plaintiff] Packard to lose sales," (ii) ample evidence supports that determination, and (iii) the case is now awaiting trial in the district court.

RULE 29.6 STATEMENT

The respondents are private corporations that have not issued shared of stock to the public, no parent or publicly held company owns 10% or more of either company's stock, and neither company has any affiliates or subsidiaries that have issued shares to the public.

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STATEMENT OF THE CASE

This Petition seeks interlocutory review of the denial of a summary judgment request by the defendants in a Lanham Act and Massachusetts state law false advertising case. The Court of Appeals held that summary judgment was inappropriate because, *inter alia*, "a reasonable factfinder could conclude that the defendants' material mislabeling of their garments deceived the consuming public, enabled defendants to lower their garment prices, and caused [plaintiff] Packard to lose sales." *See* Petition for Certiorari ("Petition") at p. 36a. The defendants now petition this Court to review that fact-specific determination *de novo*.

Inexplicably, the Petition fails to describe the evidence which the Court of Appeals held precluded summary judgment. Instead, the Petition mistakenly assumes that there was no such evidence, and constructs an entire argument based on that assumption. In the process, it repeatedly misstates the facts, the issues, and the applicable law in an attempt to suggest that the Court of Appeals' decision is somehow a departure from existing precedent, inconsistent with appellate decisions from other Circuits, and contrary to this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

These arguments are not persuasive, and the Petition should be denied. The evidence that the defendants materially mislabeled their garments for profit, in willful violation of both state and federal law, is compelling, and the Court of Appeals correctly stated and applied the pertinent rules of law in holding that summary judgment was inappropriate.

A. THE PARTIES, THE CLAIMS, AND THE PROCEEDINGS BELOW

The plaintiffs-respondents herein are L.W. Packard & Co., Inc. ("Packard"), a manufacturer of cashmere and cashmere-

wool blend fabric which sold its products to garment manufacturers, and the Cashmere and Camel Hair Manufacturers' Institute (the "Institute"), a trade association of domestic and foreign cashmere manufacturers formerly known as the Camel Hair and Cashmere Institute of America. *See Camel Hair and Cashmere Manufacturers Institute v. Associated Dry Goods Corporation, et al.*, 799 F.2d 6 (1st Cir. 1986). The defendant-petitioners are manufacturers and retailers of ready-to-wear garments.

In the action below, plaintiffs have alleged that throughout most of the 1990's, defendants Harve Benard, Ltd. ("Harve Benard"), Saks Fifth Avenue ("Saks"), and Filenes Basement ("Filenes")[1] trafficked in falsely described goods in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); sections 2 and 11 of the Massachusetts Unfair and Deceptive Trade Practices Statute, M.G.L. c. 93A; and common law principles of unfair competition. Specifically, plaintiffs claim that during the relevant time period, the defendants unlawfully passed off thousands of partially recycled wool garments (the "Harve Benard garments") as cashmere by falsely representing, in fine print hang tags, that they consisted of "10%" cashmere, and then falsely labeling them, on much more prominent sewn-in tags, as "*Cashmere and Wool*," "*A Luxurious Blend of Cashmere and Wool*," "*Cashmere Blend*," or "*Wool and Cashmere*."

Packard seeks damages and other monetary relief on account of the fact that during the relevant time period, its garment manufacturer customers significantly reduced their purchases of Packard's genuine cashmere blend fabric because they could not compete, in the low cashmere blend garment market, with

---

1. Filenes is now in bankruptcy. *See In re FBC Distribution Corp. f/k/a Filenes Basement Corp.*, Case No. 99-16985 (D. Mass. Bkrptcy 1999).

the mislabeled Harve Benard garments — which, although prominently labeled as cashmere, in fact contained no cashmere and were partially recycled, and therefore cost substantially less to make. The Institute has not sought damages; only injunctive relief and its litigation expenses.

In their motion for summary judgment, the defendants conceded that the issue of whether the Harve Benard garments were mislabeled was "both material and genuinely in dispute." They argued, however, that there was no evidence that their alleged mislabeling had actually deceived any members of the consuming public, or caused Packard any harm, and that they were therefore entitled to summary judgment dismissing Packard's claims for monetary relief under the Lanham Act and related state laws. In August of 1998, the defendants' summary judgment motion was referred to a United States Magistrate for a report and recommendation (the "Report"). In July of 1999, that Report was issued, and recommended that the motion be allowed as to the bulk of the plaintiffs' claims.

The plaintiffs timely objected to the Report on grounds, *inter alia*, that it impermissibly drew all inferences in favor of the moving party defendants, instead of the plaintiffs, in violation of *Celotex*. Notwithstanding these objections, the district court adopted the Magistrate's Report in early 2000, granted the defendants' motion for summary judgment, and subsequently entered final judgment for the defendants.

The plaintiffs then appealed to the United States Court of Appeals for the First Circuit (without in any way "recognizing the sufficiency" of Harve Benard's testing program, as the Petition mistakenly claims). After a review of the entire record, the Court of Appeals reversed the lower court decision on grounds that, *inter alia*, "the district court relied on impermissible inferences in reaching its conclusions," and in granting summary judgment. *See* Petition for Certiorari at 2a.

B. THE EVIDENCE IN THE RECORD AT THE SUMMARY JUDGMENT STAGE

At the summary judgment stage, the following evidence was in the record, and was part of what was relied upon by the Court of Appeals in holding that summary judgment dismissing the plaintiffs' claims was not appropriate:

Harve Benard is a U.S.-based manufacturer/importer of ready-to-wear garments. In the 1990's, it sold large quantities of garments to major retail store chains such as Saks Fifth Avenue, Filenes Basement, and others. Beginning in the Fall of 1994, Harve Benard began manufacturing and selling a new line of womens' coats, labeled as consisting of a blend of cashmere and wool, that were made of fabric purchased from a textile mill in Prato, Italy called Marcolana Lanificio S.R.L., or "Marcolana." It continued to sell these Harve Benard garments throughout the period 1994-1999.

In 1995, the plaintiffs began purchasing random samples of the Harve Benard garments from retail locations in New York, Boston, and New Jersey. Like all the Harve Benard garments at the time, these were labeled with hang tags representing, in fine print, that they contained "10% Cashmere," and separate sewn-in labels claiming, in larger and more prominent typefaces, that they were "*A Luxurious Blend of Cashmere and Wool*," "*Cashmere and Wool*," or "*Wool and Cashmere.*" Each sample was assigned a control number (*e.g.* "CCMI No. 428B", A76), and each garment and/or its fabric was forwarded to one or both of two well-established experts in the field of cashmere identification and textile analysis. One expert, Prof. Kenneth D. Langley, employed high resolution light microscopy to conduct his analyses. The other expert, Dr. Franz-Josef Wortmann, Ph.D., used a powerful electron microscope.

Both experts had worked for decades, and had published extensively, in the specific fields of textile analysis and cashmere identification.

In each case, the experts found that the Harve Benard garments contained no cashmere. Dr. Wortmann also concluded that approximately 10 to 20% of the fibers in the Harve Benard garments were recycled — that is, reconstituted from the chopped up and chemically stripped remnants of previously used or woven garments. This conclusion was later supported by an admission in Harve Benard's documents that its Marcolana mill was using "recicled" material to make the portion of the fabric in these garments that Harve Benard claimed was cashmere.

After this litigation was filed, the presence of recycled material in the Harve Benard garments was confirmed in the report of one of Harve Benard's own experts. After that report was issued, and plaintiffs pressed the matter by filing a motion for temporary restraining order, Harve Benard agreed to change the fine print percentage content labels on the Harve Benard garments to add the word "Recycled." *See* Petition at 4a, note 3 ("After this suit was filed, Harve Benard agreed to label its 1996 and subsequent line of blazers as being made from recycled cashmere.")

The defendants continued to represent that the Harve Benard garments consisted of "10%" cashmere, however, and to market the garments with separate sewn-in labels claiming, in a larger typeface which made no reference to the "10%" figure or the word "recycled," that they were "*Cashmere Blend*," or "*Wool and Cashmere.*" The garments also continued to be prominently advertised in catalogues as "**cashmere blend** *jackets*," again with no reference to the word "recycled." In 1996, 1997, 1998, and 1999, the plaintiffs purchased additional samples of the Harve Benard garments and sent them to their experts for

analysis. Again, in each and every case, the garments were found to contain no cashmere, recycled or otherwise.

Dr. Wortmann, an expert in probability and statistics, testified that if ten randomly selected garments were mislabeled as cashmere when in fact they were not, there was a 90% probability that the vast majority of the entire group of garments was also mislabeled. In this regard, ten randomly selected Harve Benard garments were tested in 1995, and all were found to contain virtually no cashmere. Thereafter, nine additional Harve Benard garments were tested by plaintiffs' experts — in some cases by both experts — and in each case, they were found to contain no cashmere.

During the period that Harve Benard was marketing these garments, Packard's garment manufacturer customers sharply reduced their purchases of Packard's 10% cashmere fabric because, as they explained it, they could not compete, in the cashmere blend garment market, with the Harve Benard garments — which, although labeled and represented as "Cashmere," in fact were made from cheaper woolen fabric that contained no cashmere, and was partially recycled. The testimony on this from Packard's sales agent Peter Warshaw, identified by Packard's President as "the most knowledgeable person" regarding Packard's customers, was specific:

> Q: So what is the basis for the assertion that *Gilmore stopped buying Packard fabric as a result of Harve Benard's alleged mislabeling?*
>
> A: Because sometime after that I spoke to Ben Rabiner of Gilmore, and he told me that *it was no longer possible for him to buy our product* because of the fact that manufacturers like *Harve Benard* were producing garments that

were much more competitive than garments that he, Ben Rabiner, could manufacture from Packard fabric.

Q: *Did he mention Harve Benard specifically*?

A: *Yes*. . . .

* * *

Q: What's the basis for the assertion that *RCM stopped purchasing Packard fabric as a result of Harve Benard's alleged mislabeling*?

A: Same basis as I've described for Gilmore and for others . . .

Q: *Did anyone at RCM specifically mention Harve Benard*?

A: *Yes*. . . .

* * *

Q: Who at [LWP's customer] RCM mentioned Harve Benard?

A: Michael Kaufman. . . .

* * *

Q: *Did he tell you specifically* that they could not — *that they could no longer purchase Packard fabric as a result of Harve Benard's alleged price advantage*?

A: *Yes.*

(emphasis added).[2]

In addition, during the period that Harve Benard was marketing the Harve Benard garments, another of Packard's customers attempted to sell genuine "10% Cashmere" jackets — made from Packard's 10% cashmere fabric—to the retailer Saks Fifth Avenue, but was informed by Saks that the prices of the Harve Benard garments — also represented to be "10% Cashmere" — were so much lower that Saks would not consider buying the garments made from Packard's fabric.

Again, the evidence on this from Packard's sales agent was specific:

> Q: What's the basis for your assertion that [Packard's garment manufacturer customer] Perfect Petite stopped buying Packard fabric as a result of Harve Benard's alleged mislabeling?
>
> A: I believe I've already told you about Ted Goldsmith's experience with Saks Fifth Avenue. I'd be happy to repeat it. Ted Goldsmith and his company, Perfect Petite, has enjoyed a good relationship with Saks Fifth Avenue and other retailers. . . . He had had experience with our low cashmere content fabrics, had a high regard for L.W.Packard's integrity, felt that L.W. Packard's products were extremely competitive, and decided to

---

2. The district court specifically held that Mr. Warshaw's account of these statements by Packard's customers, "in which these customers attributed their reluctance to purchase LWP fabric to HB's [Harve Benard's] price advantage," was admissible in evidence. Petition at 75a.

> try and penetrate the low cashmere content blazer market and decided to try it with Saks Fifth Avenue.
>
> So he sampled a 10 percent cashmere blazer fabric from us, tailored the garment, showed it to the Saks buyer and *was told by the Saks buyer that . . . it was too expensive relative to what she had been using from Harve Benard.* And in that instance *Harve Benard was specifically mentioned. . . .*
>
> * * *
>
> Q: And Perfect Petite stopped buying Packard fabric allegedly as a result of Harve Benard's alleged mislabeling and other manufacturers' alleged mislabeling?
>
> A: *Yes.*

(Emphasis added). The problem, as Packard's President John Glidden explained in his deposition, was that

> [b]ecause Harve Benard was not putting the cashmere in the fabric, they had a tremendously reduced cost. . . . the added expense of putting cashmere in a garment or in a fabric increases the garment's cost; and when we legitimately labeled our fabrics, they were too expensive for the marketplace which Harve Benard was selling to . . .

In this regard, it is undisputed that Harve Benard was paying 50% less, for the fabric it was using to make the Harve Benard garments, than Packard's customers had to pay for legitimate 10% cashmere fabric. Thus, as Packard's sales agent put it:

"[i]t's a labeling and price issue. We are competing with a legitimate 10 percent [cashmere] fabric against fabric that does not have any cashmere in it . . ."

Based on its sales and revenue figures, Harve Benard was a major participant in the low cashmere blend garment market during the relevant time period, dealing in hundreds of thousands of the Harve Benard garments every year. In the year that it first began marketing the Harve Benard garments, Harve Benard's revenue from the sale of purported "10% Cashmere" garments increased by more than two hundred fifty percent (250%) over what it had been the previous year. Thereafter, during the 1994-1998 period, its revenues from sale of the Harve Benard garments continued at this higher level.

Packard, correspondingly, was the major U.S. participant in the low cashmere blend fabric market during the relevant time period,[3] and in the first year that the defendants began marketing the Harve Benard garments, Packard's overall fabric sale revenues dropped by twenty-five percent (25%) from the previous year. In the years that followed, Packard's overall fabric sales revenues continued to be depressed, relative to what they had been before the introduction of the Harve Benard garments.

Other aspects of Packard's business were also negatively affected by the problem of the Harve Benard garments. Packard described some of these effects in its supplemental interrogatory answers:

> In addition to the damages calculated using the method identified in Packard's response . . . [and] the profits unjustly made by the defendants . . . , Packard was . . . damaged as follows:

---

3. Mr. Warshaw testified in his deposition, which was part of the summary judgment record, that only Packard and one other United States mill made low content cashmere fabric during the relevant time period; and that the other mill made very little in comparison to Packard.

> a. the low cost of [low cashmere blend] garments due to the defendants' false labeling caused the market price of such garments to fall. Because of the defendants' unfair price advantage, *Packard lost existing customers* . . . [and]
>
> b. The loss of business due to the defendants' mislabeling . . . forced Packard to decrease its labor force by laying off 49.5 employees in calender year 1995 . . .

(Emphasis added). As Packard's President, John Glidden, explained:

> A: . . . We had the ability to produce large quantities of blazer weight [cashmere blend] fabrics . . . and *Harve Benard's cheating of* [sic on] *the labeling of their garments kept us from growing our market into that area* . . . We had finished making considerable investments in plant and equipment, completing it in 1994, 1995 . . . and *we were unable to sell the goods in the marketplace.*
>
> Q: What specific evidence do you have that Harve Benard's alleged activities caused your inability to reach full manufacturing capacity?
>
> A: . . . customers were telling us . . . that we were losing business and they were not ordering from us *because of the mislabeled Harve Benard garments.*

(Emphasis added).

During this period, at least as early as January 1995 (a year *before* the commencement of this action), Harve Benard knew that recycled material was being used to make the portion of the Harve Benard garments that it was claiming to be cashmere,

because it had received a communication in writing from its fabric supplier stating "FOR YOUR INFO PLS NOTE MILL IS USING RECICLED CHASMERE [*sic*]". *See* Petition at 54a ("It may be inferred that HB [Harve Benard] received the letter . . . and . . . was at least on inquiry notice as early as January 1995 that the [alleged] cashmere in its blazers was not virgin, but recycled").

Nevertheless, Harve Benard continued to market the Harve Benard garments without any "recycled" designation on them, and without disclosing, as required by law,[4] that the purported cashmere in them consisted of recycled material, until months after the commencement of this lawsuit in 1996, and even then only after the plaintiffs sought a temporary restraining order on the issue. When Saks, one of Harve Benard's biggest customers, learned that the purported cashmere garments it had purchased from Harve Benard might not be as labeled, and specifically might be recycled, its Merchandise Manager and in-house counsel informed Harve Benard, both orally and in writing, that if that were so, Saks would not wish to sell the garments.

Again, the evidence on this point was specific, and came from Saks' own representative:

> Q: At the January 11, 1996 meeting, . . . *Lynne Ronon, the merchandise manager at Saks, told Harve Benard that Saks did not wish to sell garments containing recycled cashmere; correct*?
>
> A: *Correct. . . .*
>
> Q: And then in your letter written ten days or eleven days later, *you confirm that to Harve*

4. The Wool Products Labeling Act, 15 U.S.C. § 68, *et seq.*, requires that recycled material, whether wool or cashmere, be labeled "recycled."

> *Benard's attorneys by reminding them that* Lynne Ronon had advised Harve Benard that, in your words, "*Saks does not wish to sell jackets containing recycled cashmere*"; correct?
>
> A: That's what the letter says.
>
> Q: And it's your letter?
>
> A: *It's my letter.*

(Emphasis added). In this regard, recycled fabric is manufactured "through the physical or chemical deconstruction", of pre-existing fabric and garments, which are chopped up, chemically stripped, dried, and then rewoven. It is qualitatively inferior to new fabric, and does not perform or hold its appearance as well. As the Institute's President explained in his affidavit:

> I have personally observed the process of used garments being recycled both in Italy and the United States. The process of recycling . . . involves the use of machinery *to tear apart existing garments*, during or after which they are subjected to a *wet processing* with the resulting wool fibers *dried out*, frequently carbonized (*subjected to heat and sulphuric acid), and then reused* in the manufacture of other fabric.
>
> In the process of tearing apart existing garments, *considerable damage is inevitably done* to the fibers in those garments, and *additional damage is also done by the acid and other chemical treatments* applied to them during the recycling process. The result is that *recycled fibers* frequently have *substantial damage to their scale structure which effects their ability to felt, or bind together*, thereby

> effecting the ability of a recycled fiber fabric to hold together as well or as long as the fibers that are being used in the fabric for the first time. . . .

Petition at 112a-113a (emphasis added).

Thus, at the summary judgment stage, there was evidence in the record that the defendants had intentionally and materially mislabeled inferior garments (i) by failing to disclose that they were "recycled" (the "recycled cashmere claim"), thereby giving the impression they were new; and (ii) by labeling them "cashmere" when in fact they were not (the "cashmere content claim"), thereby lying about what the garments actually were. *See* Petition at 4a. As the Court of Appeals pointed out, there was also evidence that this false advertising had caused harm to the plaintiffs:

> a rational factfinder could reasonably infer that the substantial cost savings Harve Benard enjoyed from using non-cashmere or recycled cashmere fabric allowed Harve Benard to lower the price of its blazers, thereby preventing Packard's customers from competing in the market. Indeed, using inexpensive materials that are represented as something more valuable would create a substantial competitive advantage by undercutting competitors who correctly represent their products. . . . This reasonable inference, to which plaintiffs are entitled at summary judgment, enables plaintiffs to demonstrate the causal link between the harm they suffered and defendants' misrepresentations.

Id. at 32a-33a. The Petition fails to confront this evidence, and simply pretends that it does not exist. In the process, it misstates the record, and the holdings of a number of prior appellate decisions in the false advertising area.

C. THE MISSTATEMENTS IN THE PETITION FOR CERTIORARI

The misstatements in the Petition for Certiorari fall into several different categories.

First, the Petition repeatedly claims that there was "no proof of materiality, no proof of consumer deception, and no proof of causation, each of which is an essential element of a Lanham Act damages claim." *See* Petition at 1, 8-15. In fact, there was ample evidence that the two types of false advertising in issue in this case — labeling the garments as cashmere when in fact they were not, and failing to label them recycled when in fact they were, *see* Petition at 4a — were material, inherently deceptive, and had caused harm to the plaintiffs. *See* Petition at 15a-20a (describing the evidence as to materiality); at 20a-30a (describing the evidence as to literal falsity and deceptiveness of the labels); at 30a-35a (describing evidence of causation and damages). The Petition simply ignores this evidence, preferring, as the Court of Appeals pointed out (in the case of one piece of evidence), to "misunderstand or underestimate" the import of it.

Second, the Petition claims that the Court of Appeals decision permitted plaintiffs to "rely upon a series of unrecognized presumptions and inferences." *See* Petition at 2, 3-4, 5-7. 9-10. In fact, the presumptions that Court of Appeals relied upon were basic and well-established ones dealing with the discrete issue of whether evidence of "consumer reaction" is required to show "deceptiveness" in a situation where the challenged advertisements are literally false. *See* Petition at 13a ("[w]here the advertisement is literally false, a violation may be established without evidence of consumer deception"); at 23a ("we can presume . . . that consumers have been deceived when a defendant has explicitly misrepresented a fact that relates

to an inherent quality of characteristic of the article sold"); at 26a ("[i]t is well-established that if there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived").

In mistakenly arguing that these presumptions are "previously unrecognized," the Petition repeatedly, and badly, miscites prior decisions of the Court of Appeals and other Circuits — typically by confusing distinguishable legal concepts such as "materiality," "deceptiveness," and "harm." The Petition argues, for example, that "[b]efore the Court of Appeals opinion, only plaintiffs seeking injunctive relief (not damages) were entitled to a presumption of consumer deception when the alleged false advertisement was literally false." Petition at 5. This is incorrect, because as the Court of Appeals pointed out, "it has become the practice of most circuits to apply the presumption to all literal falsity claims," *see* Petition at 21a (citing cases), and the Court of Appeals itself had already done so in an earlier damages case, *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.2d 24, 30 (1st Cir. 2000). *See* Petition at 22a ("defendants' argument contradicts this Court's explicit pronouncements on the issue").

Third, the Petition argues that "no court of appeals, including the First Circuit, had ever applied such a presumption to a plaintiff seeking damages without the additional showing of intentional mislabeling not present here." Petition at 7. This is simply untrue, as the Court of Appeals specifically pointed out in its opinion. *Id.* at 23a ("None of the five circuit cases cited *supra*, however, speaks of intent to deceive as a prerequisite to applying a presumption of consumer deception on a literal falsity claim . . . [rather] the intent to deceive is an independent basis for triggering a presumption of consumer deception"). Moreover, there *is* evidence of intentional mislabeling here, as the Court of Appeals (again) pointed out.

Id. at 26a-30a ("Harve Benard's unwillingness to comply with the law, despite being on notice of its violation, can be seen as an attempt deliberately to deceive the consuming public"). The Petition simply ignores it.

On the issue of the "materiality," the Petition makes the same mistake in claiming, repeatedly, that there was no evidence that the defendants' alleged false advertising was material, and that "[t]he Court of Appeals ruled . . . that Packard could simply rely upon 'presumptions' of . . . materiality." *See* Petition at 8. *See also* Petition at 10 ("A Lanham Act plaintiff . . . can now rely upon . . . a presumption of the element of materiality."); *id.* at 14 ("the Court of Appeals simply presumed that the actual percentage of cashmere in a garment . . . would be likely to influence the purchasing decision.").

In fact, there was ample evidence of materiality, and as the Court of Appeals explained, "[o]ne method of establishing materiality involves showing that the false or misleading statement relates to 'an inherent quality or characteristic' of the product." *See* Petition at 15a. In this regard, the Court correctly observed, as to the plaintiffs' "cashmere content claim," that "cashmere is a basic ingredient of a cashmere-blend garment; without it, the product could not be deemed a cashmere-blend garment or compete in the cashmere-blend garment." *Id.* at 16a. As to the "recycled cashmere claim," the Court noted that there *was* actual evidence of materiality in the record:

> Saks initial refusal to sell the recycled cashmere garments; Saks' belief that the matter could lead to a negotiation; and the actual negotiations that took place before Saks agreed to continue selling the garments are competent evidence from which a reasonable juror could conclude that the issue related to an inherent quality or characteristic of the garment,

id. at 19a, and that even apart from that evidence,

> a rational factfinder could conclude that consumers, especially experienced ones like retail stores, would likely be influenced in their purchasing decisions by labeling that gave the false impression that the garments contained virgin cashmere.

Id. at 18a.

Again, the Petition simply ignores this evidence, preferring to advance the discredited argument (rejected by the Court of Appeals) that out-of-context quotations from the defendants' early Rule 30(b)(6) deposition of Packard dealing with individual consumers, instead of the retail store consumers primarily in issue, *see* Petition at 18a ("[i]n this case, the relevant consumers include . . . the retail stores that purchased Harve Benard garments instead of buying from Packard's garment manufacturer customers"), somehow shows a lack of evidence on the "materiality" and "consumer deception" issues. *See* Petition at 12-13. In fact, this argument is nothing more than a sleight of hand, because testimony from that deposition made it clear that the statements were limited to individual consumers, and that as to the far more important (to this case) retail consumers, there was ample evidence on both issues — as the Court of Appeals recognized. *See* Petition at 15a-30a.

The Petition goes even further than misstatement, though, in asserting that the Court of Appeals decision "ignores the undisputed fact that Harve Benard's fabric . . . contained less expensive recycled cashmere." Petition at 15. That alleged "fact" was not at all "undisputed" — to the contrary, the plaintiffs' evidence was that the garments contained virtually no cashmere, recycled or otherwise. *Id.* at 3a ("the [plaintiffs'] experts independently concluded that, despite Harve Benard's labels to the contrary, the garments contained no cashmere.")

This problem of ignoring, misstating, and confusing the record permeates other portions of the Petition as well. On the one hand, the Petition argues that "Harve Benard's use of less expensive fabrics" was the only evidence that its widespread mislabeling had caused the plaintiffs any harm. *See* Petition at 14. On the other hand, it claims that there was no evidence "that Harve Benard's garments were cheaper *because* they were mislabeled" (emphasis in original). *Id.* at 15. In fact, as the Court of Appeals recognized, there *was* such evidence, and it included the fact that "[b]ecause Harve Benard was not putting the cashmere in the fabric, they had a tremendously reduced cost." *Id.* at 34a. *See also* Petition at 32a ("Harve Benard was paying $5 per yard less for the fabric it was using to make its garments than Packard's customers, who were paying for legitimate 10% cashmere fabric"). There was also evidence that "Packard's customers actually reduced their purchases of Packard's cashmere-blend fabric because they could not compete with Harve Benard's lower priced garments." *Id.*

The defendants argued to the Court of Appeals, and continue to argue in the Petition, that this evidence was insufficient to suggest that their mislabeling gave them an unfair competitive advantage. The Court of Appeals recognized, though, that "using inexpensive materials that are represented as something more valuable would generally create a substantial competitive advantage by undercutting competitors who correctly represent their products," *see* Petition at 32a, and that "[i]n the end, the parties present witnesses who hold inconsistent positions on a crucial issue of fact . . . this dispute is one which a jury is best suited to resolve." *Id.* at 35a.

The Petition characterizes this result as "plac[ing] advertisers and merchants (both wholesalers and retailers) at the mercy of overzealous plaintiffs," implying that the petitioners are beleaguered innocents being unfairly accosted by zealots.

See Petition at 16. Unfortunately, the evidence suggests the reverse — that it is the Petitioners who are zealously prepared to go to any lengths, and make any argument necessary, to avoid being held accountable for nearly a decade of materially false advertising. In either event, there is no justification for an interlocutory review of the case by this Court, particularly before trial.

REASONS FOR DENYING THE PETITION

The Petition should be denied because (1) the Court of Appeals decision involved nothing more than the application of well-settled principles of law to a set of disputed facts; (2) there is no conflict between the Court of Appeals decision and those of other Circuits dealing with these issues, (3) there are no exigent circumstances warranting interlocutory review of the Court of Appeals' decision, and in any event, the decision was correct.

I. THE COURT OF APPEALS DECISION INVOLVED THE APPLICATION OF WELL-SETTLED RULES OF LAW TO DISPUTED FACTS

The Petition's claim that the Court of Appeals decision announced a "new rule" of law is simply mistaken. *See* Petition at 23a ("noting that its decision on the "deceptiveness" issue "require[d] neither a leap of faith nor the creation of any new legal principle"). In fact, the decision applied existing rules to evaluate the propriety of summary judgment in a situation where the defendants, while conceding that there was legally sufficient evidence of their mislabeling, argued that they should escape liability anyway — based on their claim that there was insufficient evidence to satisfy the other elements of a false advertising claim.

The application of well-settled rules to disputed facts is not the type of situation in which this Court customarily intervenes, nor should it. *See* U.S. Supreme Ct. Rule 10. This is particularly true in this case, where the Court of Appeals, exercising *de novo* review of a summary judgment order in a private civil action brought under both state and federal law, based its determination on the fact that "the district court relied on impermissible inferences in favor of the moving party in reaching its conclusions" — in violation of Fed. R. Civ. P. 56 and this Court's holding in *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

II. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND THOSE OF OTHER CIRCUITS DEALING WITH THESE ISSUES

The Petition's claim that the Court of Appeals decision is somehow in conflict with those of other Circuits on these issues is insupportable, as a simple review of those decisions makes clear. *See Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993) ("a [false advertising] plaintiff must prove *either* literal falsity or consumer confusion, but not both"); *Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988) ("When a . . . representation is literally . . . false, the court may grant relief without reference to the advertisement's impact on the buying public"); *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000) (holding, on a claim for both damages and injunctive relief, that "when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers"); *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 740 (8th Cir. 2000) (ruling, on a claim for damages, that "when an advertisement is literally false . . . the plaintiff need not prove that any of its customers were actually persuaded by

the advertising"); *Balance Dynamics Corp. v. Schmidt Industries*, 204 F.3d 683, 693 (6th Cir. 2000) ("noting that when an advertisement is literally false, 'a plaintiff need not demonstrate actual consumer deception to obtain relief' "); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971 (7th Cir. 1999) (ruling, on a damages claim, that "(w)here the statement in question is actually false, then the plaintiff need not show that the statement either actually deceived customers or was likely to do so"); *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1333 (8th Cir. 1997) (consumer deception presumed where there is evidence that the defendants acted deliberately to deceive); *U-Haul Int'l Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (same).

Thus, there is no conflict between the Circuits that this Court needs to resolve, and nothing extraordinary about the Court of Appeals' application of existing law in this area.

III. THERE ARE NO EXIGENT CIRCUMSTANCES WARRANTING INTERLOCUTORY REVIEW OF THE COURT OF APPEALS' DECISION, AND IN ANY EVENT THE DECISION WAS CORRECT

The Petition claims that the Court of Appeals decision is not only wrong, but is so badly wrong that it must be reviewed by this Court before the upcoming trial on the merits. *See* Petition at 15-16. The petitioners' rationale for this argument is that the decision represents an "unprecedented contraction of the availability of summary judgment" in false advertising cases, and that as a result, "so long as a Lanham Act plaintiff seeking damages complies with the notice pleading standard in its complaint, its claims will remain untested until a defendant presents evidence at trial." *Id.* at 16.

These dramatic assertions are not supported by the record, and in fact are premised entirely on the Petition's incomplete

and inaccurate description of the record. *See* Statement of the Case, *supra*. The key evidence at the summary judgment stage of any false advertising case is whether the relevant products were falsely labeled or not — and that is not even in question here, because as the Court of Appeals pointed out, "defendants conceded that the issue of whether the[ir] garments were mislabeled is both material and genuinely in dispute," Petition at 6a, and "[f]or purposes of this appeal, defendants concede that they have made a false or misleading statement of fact in describing their blazers"). *Id.* at 15a. Thus, evidence beyond the pleadings was obviously required here, and submitted.

It is also beyond purview that the additional evidence described in the Statement of the Case, *supra*, was part of the summary judgment record that the Court of Appeals reviewed when it made its decision. As stated, this included evidence of materiality, intent, and causation of harm. Thus, the Court of Appeals decision was not predicated on pleadings, nor can it be construed as sanctioning such an approach. It was based on actual evidence in the record — evidence which there is no good reason for this Court to review again, particularly where no unsettled or controversial issues of law are involved.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

ROBERT J. KALER
GADSBY & HANNAH, LLP
225 Franklin Street, 22nd Floor
Boston, Massachusetts 02110
(617) 345-7000

Attorneys for Respondents